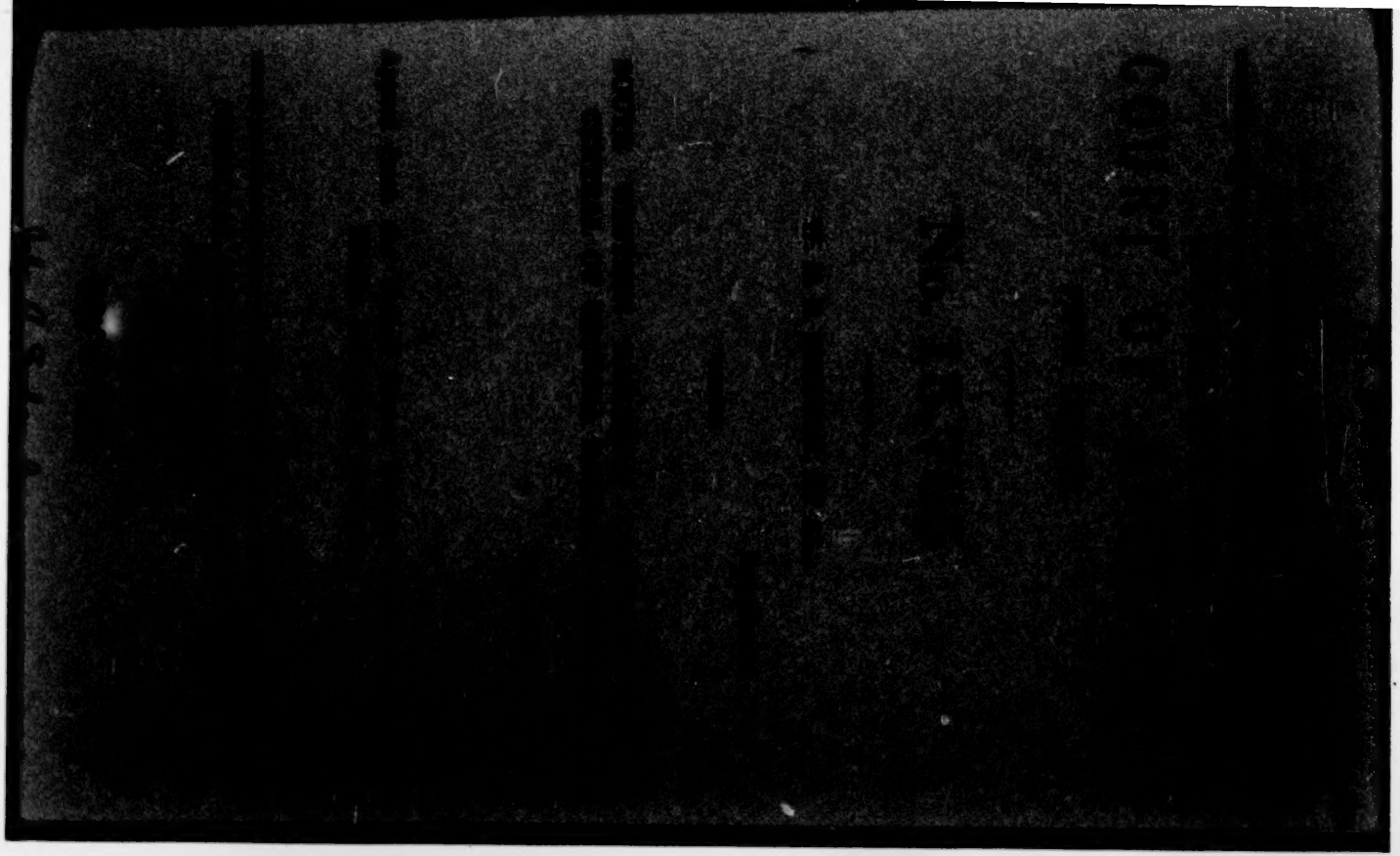
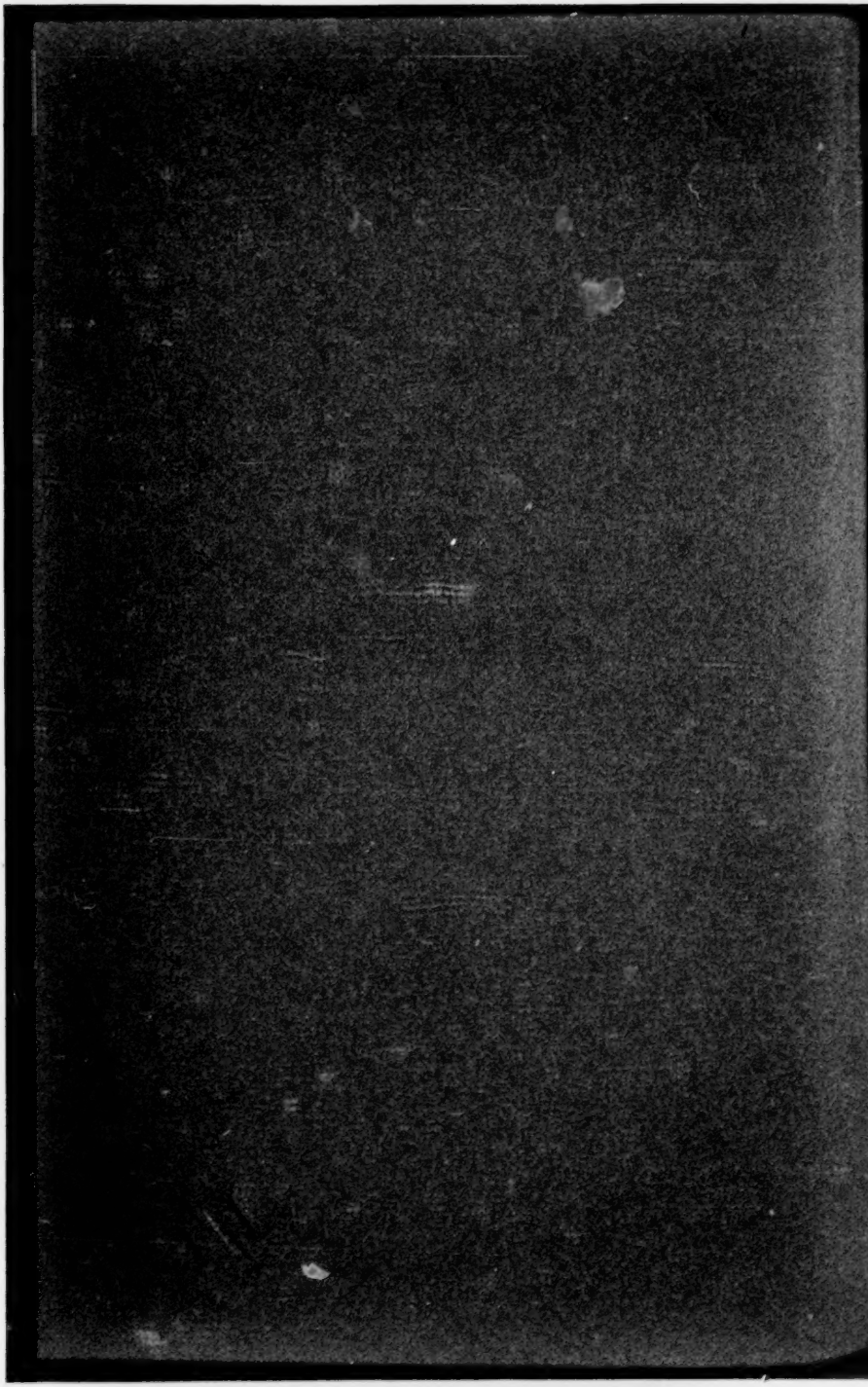




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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF GEORGIA, MACON DIVISION.

Civil Action No. 1156.

W. H. B. SIMPSON, LUCY C. B. SIMPSON, MARY ELIZABETH SIMPSON, T. H. BOWDEN, ANSEL M. SMITH, BELK-SIMPSON COMPANY OF ABBEVILLE, SOUTH CAROLINA, INC., BELK'S DEPARTMENT STORE OF CLINTON, SOUTH CAROLINA, INC., THE GREENVILLE BARGAIN HOUSE, a corporation of the State of South Carolina,

Appellants,

versus

SOUTH WESTERN RAILROAD COMPANY, and CENTRAL OF GEORGIA RAILWAY COMPANY,

Appellees.

Appearances:

Mr. Charles H. Bloch, Bloch, Hall, Groover & Hawkins, Attorneys at Law, First National Bank Building, Macon, Georgia, Attorneys for Appellants.

Mr. John B. Miller, Attorney at Law, 26 E. Bryan Street, Savannah, Georgia, Mr. H. D. Russell and Mr. Walter A. Harris, Attorneys at Law, Persons Building, Macon, Georgia, Attorneys for the Appellees.

APPEAL from the District Court of the United States for the Middle District of Georgia, Macon Division, to the United States Court of Appeals for the Fifth Circuit, returnable at the City of New Orleans, Louisiana.

State of Georgia,
County of Bibb.
To the Superior Court of said County:

The petition of W. H. B. Simpson, Lucy C. B. Simpson, Mary Elizabeth Simpson, T. H. Bowden, Ansel M. Smith, Belk-Simpson Company of Abbeville, South Carolina, Inc., Belk's Department Store of Clinton, South Carolina, Inc., the Greenville Bargain House, a corporation of the State of South Carolina, respectfully shows:

1.

South Western Railroad Company is a corporation created by an Act of the General Assembly of Georgia of December 27, 1845 with its principal office and place of doing business in Macon, Bibb County, Georgia, and is herein named as a defendant.

2.

Central of Georgia Railway Company is a corporation created and existing under the laws of the State of Georgia and has an office and place of doing business in Macon, Bibb County, Georgia, and is subject to the jurisdiction of this Court. It is herein named as a defendant.

3.

The present capital stock of South Western Railroad Company is $5,191,100.00, all of which is represented by common stock of a par value of $100.00 per share. Your petitioners own 664 shares of the aforesaid common stock of South Western Railroad Com-

pany and owned them on March 11, 1954, and for some time prior thereto.

4.

The properties of South Western Railroad Company are free from mortgage or other liens. It owes no bonded indebtedness. This statement is true not only as to the present but as to all time since January 1, 1930.

5.

On January 1, 1947, its current indebtedness, which constituted all of its liabilities, was $212,610.33. On March 25, 1947, its current liabilities were less than $100,000.00. On December 31, 1951, its current liabilities were $4,331.21, and on December 31, 1952 were $1,658.81.

6.

On December 31, 1953, according to the report of the Board of Directors of the company for the calendar year 1953 submitted to the stockholders as of February 25, 1954, its total assets were $14,327,728.55. Of these assets, $466,906.43 were in bonds, $29,545.31 in notes, and $748,000.00 certificates of indebtedness. In addition thereto, its current assets were $43,884.16. Its total current liabilities were $611.01. Its surplus was $9,130,975.56.

7.

The capital stock aforesaid is represented by 51,911 shares, of which the Central of Georgia Railway Com-

pany by reason of facts which will hereinafter be alleged, owned or claimed to own 50,368 shares.

8.

The South Western Railroad Company comprises some 340 miles of railroads, bridges, depots and appurtenances thereto in the heart of the system of the Central of Georgia Railway Company. Emanating from Macon, the lines of South Western form that part of the Central of Georgia System extending from Macon through Fort Valley to Americus, Smithville and Albany, Georgia and Columbia, Alabama. There joins with the latter line at Smithville a branch which extends from Smithville to Eufaula, Alabama. In 1942 the Interstate Commerce Commission valued the road and equipment property at $12,830,257.00. On December 31, 1953, the then directors of the South Western Railroad Company valued the road and equipment property at $13,043,249.13.

9.

On December 19, 1932, the properties of the South Western Railroad Company were being operated by the Central of Georgia Railway Company under a long-term lease which produced to the South Western a rental sufficient to pay stockholders an annual dividend of 5%. The annual rental was $259,500, plus an amount sufficient to cover taxes and organizational expenses.

10.

On that date, in an equity cause entitled Alabama Fuel & Iron Company, complainant v. Central of

Georgia Railway Company, defendant, pending in the United States District Court for the Southern District of Georgia, H. D. Pollard was appointed receiver of the property and assets of the Central of Georgia Railway Company.

11.

The said receiver continued to operate the properties of the Central of Georgia Railway Company and continued to operate the South Western Railroad, the receiver having adopted the lease of South Western.

12.

On June 19, 1940, Central of Georgia Railway Company filed its petition in the District Court of the United States for the Southern District of Georgia, stating that it was unable to meet its debts as they matured and that it desired to file a plan or reorganization under the provisions of Section 77 of the Federal Bankruptcy Act. Thereupon, trustees in bankruptcy were appointed by said Court for the properties of Central of Georgia Railway Company.

13.

The trustees of the properties of the Central of Georgia Railway Company then entered into a contract with South Western to adopt the lease on a modified basis whereby the trustees agreed to pay in lieu of rental the net income of the leased property, and to guarantee South Western against losses and expenditures for additions and betterments in excess of $50,000 per annum.

The net income of the leased property, to-wit, the properties of the South Western Railroad Company, for the period June 19, 1940 to July 1, 1943, was determined by a so-called segregation formula, sometimes hereinafter referred to as the bankruptcy formula, which was promulgated by the Interstate Commerce Commission (252 I.C.C. 587) and approved by the District Court of the United States for the Southern District of Georgia on the 19th day of August, 1943. In its report approving the bankruptcy formula the Interstate Commerce Commission said: "The Court order referring this matter to us does not state the purposes for which the formula is to be used. Our recommendations herein, therefore, are in no wise intended to express any views with respect to the use of the results obtained from the application of the formula or the weight to be given such results."

14.

Under this formula, the earnings of South Western were as follows:

(a) June 19, 1940 to December 31, 1940, deficit	26,506.85
(b) Year 1941, earnings	204,707.28
(c) Year 1942, earnings	1,260,451.32
(d) First 6 months of 1943, earnings	1,293,659.98
Total	$2,732,311.73
Less Federal income taxes	1,275,887.00
Balance	1,456,423.74
Less additions and betterments	50,424.82
Net income to South Western for the period June 19, 1940 through June 30, 1943	1,405,998.92

15.

The contract between the trustees of the Central and the South Western under which Central operated South Western during the period stated in the above paragraph was terminated July 1, 1943, and thereafter the trustees of Central adopted the South Western lease for the duration of the bankruptcy.

16.

A plan of reorganization of the Central was promulgated by the Interstate Commerce Commission and was approved by the Bankruptcy Court June 24, 1946. That plan allotted to South Western $2,200,000 of the first mortgage 4% series A bonds of the reorganized Central of Georgia Railway Company, and $1,770,000 of 4½% income bonds series B of the reorganized company.

17.

With respect to the leased lines of the Central, including the South Western, the plan of reorganization also provided:

"Prior to or upon consummation of the plan, the debtor shall also acquire, if they can be acquired on the terms hereinafter set forth, (which are those just stated in the preceding paragraph) properties at present leased to the debtor by the South Western Railroad Company, and the Augusta and Savannah Railroad, and the Chattahoochee and Gulf Railroad; provided, however, that this provision so far as it concerns the Chattahoochee and Gulf Railroad Company

may, in the discretion of the reorganization managers, be disregarded if the reorganized company shall not acquire the railroads of the South Western Railroad Company. If any of these properties shall not be acquired as a result of the acceptance of the plan by the leased line security holders, then and in that event the lease or leases of any line or lines not so acquired shall be disaffirmed as of such time at or prior to the consummation of the plan as the Court may direct. The method of acquisition, whether through purchase, merger or consolidation, shall, subject to the approval of the Commission and the Court, be determined by the trustee or by the reorganization managers when they begin to function."

18.

At annual meetings of stockholders of South Western held on March 9, 1944, March 8, 1945, and March 14, 1946, it was resolved by the stockholders that the proposed plan to purchase the South Western's properties was grossly unfair and inadequate, and that the proposal was rejected.

19.

On February 11, 1947, the Interstate Commerce Commission submitted the plan to creditors and leased lines for their acceptance or rejection on or before midnight, March 28, 1947.

20.

On March 13, 1947, the directors of the South Western met, a quorum being present but two of the

directors being absent, and resolved that the plan be accepted, subject to the assent by the holders of a majority of South Western Railroad Company stock; and it was further resolved that when it had been determined that a majority of the holders of South Western Railroad stock had assented to the acceptance of the plan of reorganization of the Central, the proper officers of the South Western were authorized and directed, in carrying out the approved plan of reorganization, to sell to the reorganized company all of the South Western Railroad properties (including its real estate, but excluding cash and securities in its treasury), rights and franchises, as authorized by Section 94-328 of the Code of Georgia Annotated of 1933, and to execute such written instruments as might be necessary or appropriate to convey the fee simple title thereto to the reorganized company.

21.

On the 25th day of March, 1947, L. O. Benton, Jr. and Charles J. Haden as stockholders of the South Western Railroad Company, presented to the Honorable Mallory C. Atkinson, one of the Judges of the Superior Court of Bibb County, Georgia, a petition for injunction, in which it was prayed that the officers and directors of South Western Railroad Company be restrained and enjoined from holding a stock holders' meeting on March 28, 1947, and from submitting to such meeting a proposed plan to sell the railroad properties of the South Western Railroad Company, and that if the Court should not restrain and enjoin the holding of the stockholders' meeting and if at that meeting a mere majority of the stockholders should vote in favor of the acceptance of the

plan and the resulting sale of all the railroad properties of the South Western Railroad Company, that the officers and directors of South Western be restrained and enjoined from carrying such action of the stockholders into effect.

22.

The said Superior Court Judge on March 25, 1947, ordered the officers and directors of South Western to show cause before him the next day at 10:00 a.m. why they should not be enjoined as prayed. Hearings were held before the said Judge on March 26 and March 27, 1947. The said Superior Court Judge did not restrain or enjoin the holding of the meeting of March 28, 1947, and on that day the stockholders of South Western met and assented to the acceptance of the plan, 30,137 shares of stock being voted in favor of the acceptance and 9,057 shares voting against the acceptance.

23.

After hearing evidence and the argument of counsel on March 26 and March 27, 1947, the Superior Court Judge announced that an order would be passed on March 29. Thereafter, on March 29, the Court deferred passing any such order for an additional one week upon request and agreement of counsel. Thereafter, upon informal request, acquiesced in by counsel for both parties, the passage of any such order was further deferred.

24.

On April 18, 1947, M. P. Callaway as trustee of the property of the Central of Georgia Railway Company,

presented to the Honorable Frank M. Scarlett, Judge of the United States District Court for the Southern District of Georgia, a petition against L. O. Benton, Jr., Charles J. Haden and South Western Railroad Company, in which he prayed that the said Benton and the said Haden be perpetually enjoined from further prosecuting their petition in the Superior Court of Bibb County, Georgia. On April 18, 1947, at 12:30 o'clock Eastern Standard Time, the said Judge F. M. Scarlett issued a preliminary injunction enjoining the defendants as prayed in the petition.

25.

On April 24, 1947, the aforesaid Judge of the Superior Court of Bibb County, Georgia, of his own motion issued an interlocutory injunction against the defendants in the State Court suit. He put his grant of the injunction on the ground that South Western had no charter power to sell its railroad without unanimous consent of its stockholders.

26.

On August 15, 1947, the Honorable F. M. Scarlett, Judge of the United States District Court for the Southern District of Georgia, granted a permanent injunction against L. O. Benton, Jr., the plaintiff in the State Court suit, and all of the stockholders of South Western, enjoining the prosecution of the State Court suit. This order also annulled the interlocutory injunction granted by the Judge of the Superior Court of Bibb County on April 24, 1947, aforesaid.

27.

On the 9th day of September, 1947, L. O. Benton, Jr. and other stockholders of South Western Railroad Company who had intervened in the State Court proceeding, filed their appeal to the United States Court of Appeals for the Fifth Circuit. This appeal was duly heard before the Honorables Hutcheson, Holmes and Lee, Circuit Judges. On January 13, 1948, in an opinion written by Circuit Judge Holmes, concurred in by Circuit Judge Lee, with Circuit Judge Hutcheson (now Chief Circuit Judge Hutcheson) dissenting, the Court reversed the judgment of Judge Scarlett aforesaid. This opinion is reported in 165 Fed. 2d, page 877.

28.

Thereafter, to-wit, on March 15, 1948, the Supreme Court of the United States granted a writ of certiorari to the Circuit Court of Appeals of the Fifth Circuit.

Thereafter, the cause was argued in the Supreme Court of the United States, and on February 7, 1949, the Supreme Court of the United States, with an opinion written by Chief Justice Vinson, Judges Douglas and Rutledge dissenting, affirmed the judgment of the Circuit Court of Appeals of the Fifth Circuit. This case is reported at 336 U.S. page 132.

29.

Pending these proceedings in the Courts of the United States, the State Court proceedings remained in abeyance, but after the decision and final judgment of the Supreme Court of the United States, the

proceedings in the State Court came on to be heard before Judge Mallory C. Atkinson, and on December 5, 1949, he rendered a judgment, pursuant to a motion by the plaintiffs and the plaintiffs interveners for a judgment or decree on the pleadings, which judgment permanently enjoined the officers and directors of South Western Railroad Company from carrying into effect the action of the stockholders of the South Western Railroad Company taken at the meeting of March 28, 1947, and enjoined the officers and directors from conveying to the reorganized Central of Georgia Railway Company, or anyone else, or any other company, South Western Railroad's properties, rights and franchise.

On April 10, 1950, the Supreme Court of Georgia in a case entitled South Western Railroad et al., v. Benton et al., 206 Ga. 770, affirmed the judgment of Judge Atkinson, 6 justices concurring, one dissenting.

30.

South Western Railroad Company and Central's trustee thereupon applied to the Supreme Court of the United States for the grant of a petition for a writ of certiorari to the Supreme Court of Georgia seeking to review its judgment of April 10, 1950. This petition for certiorari was denied by the Supreme Court of the United States on October 9, 1950 (340 U.S. 815).

Thus the litigation between Benton and the stockholders associated with him and the South Western and Central of Georgia Railway Company and its trustee, which had begun March 25, 1947, came to an end on October 9, 1950.

31.

In the meantime, the properties of South Western Railroad Company had continued to be operated by the Central of Georgia Railway Company. This operation was under the lease aforesaid up to and through June 30, 1948. But since July 1, 1948, the operation has not been under the lease.

32.

On March 5, 1948, the United States District Court for the Southern District of Georgia, Judge Frank M. Scarlett presiding, the Court in which the bankruptcy suit was pending, had passed an order rejecting the lease of South Western Railroad Company as of the consummation date of the plan, which was July 1, 1948, and provided that:

"From and after the consummation date the reorganized company shall operate the lines of the South Western for the account of the South Western, subject to the jurisdiction of this Court; provided that, if the properties of the South Western be acquired on the terms set forth in the plan subsequent to the consummation date and within a reasonable time after the termination of the litigation now pending, the effect of such acquisition shall be the same as if such properties had been acquired on such terms on the consummation date, and the result of operation by the reorganized company of South Western's railroads for the account of South Western, whether profit or loss, shall not affect the amount of bonds distributable under the plan to South Western

Railroad Company, or the interest payable thereon from the consummation date."

33.

The order of Judge Scarlett of March 5, 1948 did not prescribe any formula for determining the results of the operation of South Western's properties by the Central of Georgia Railway Company. The properties had not been operated under the bankruptcy or segregation formula at any time subsequent to July 1, 1943.

34.

When the operations commenced on July 1, 1948, there was no agreement between Central of Georgia Railway Company and South Western Railroad Company as to a formula under which the operations should proceed, and there has been none since.

35.

After the termination of the litigation aforesaid on October 9, 1950, on October 24, 1950, a special meeting of the Board of Directors of South Western was held which was called for the purpose of considering the status of South Western Railroad resulting from the termination of the litigation aforesaid. At that meeting, Mr. B. J. Tarbutton resigned as a director of South Western; the President of South Western, the late Mr. Anton P. Wright, was authorized to employ William Wyer and Company to represent South Western Railroad Company in the preparation and adoption of a segregation formula, to be applied

to the operation of South Western Railroad Company by the Central of Georgia Railway Company from July 1, 1948 and to be applied to the operation of South Western Railroad Company by the Central of Georgia Railway Company in the future so long as such operation shall remain in effect, and to represent South Western in the application of the formula from July 1, 1948 to December 31, 1950, and thereafter from time to time as long as South Western's railroads are operated for the account of South Western by the Central of Georgia.

Even prior to October 24, 1950, Mr. Wallace Miller, Sr. as Vice President and General Counsel of South Western, had written to the officers of the Central of Georgia stating that the South Western was not conceding that the formula applied is the proper formula to be applied to South Western's operations, nor was South Western conceding that the formula referred to had been correctly applied to South Western's operations. These letters were written on December 28, 1949, March 10, 1950 and July 21, 1950.

36.

And at a meeting of the Board of Directors of South Western held on December 21, 1949, a resolution was adopted instructing Vice President Miller of South Western to notify the Central that the report showing the results of operations of South Western by Central from July 1, 1948 to April 30, 1949, was neither acceptable so far as the formula was concerned nor as to the application of the formula, and that the Central's report was received as information only. Director Benton moved the adoption of the

resolution. His motion was seconded by Director Tarbutton, who on October 24, 1950, had resigned as a director of South Western and was in January, 1951, elected President of Central of Georgia.

37.

At a meeting of the directors of South Western held on March 9, 1950, counsel for the company was directed to write a similar letter to Central regarding its statement of operations up to June 30, 1949, and to state that South Western did not concede that the formula applied to its operations was the proper formula to be applied, nor the correctness of its application.

38.

Mr. Anton P. Wright, President of South Western Railroad Company, notified the stockholders of the actions taken at the directors meeting of October 24, 1950, in a letter dated October 31, 1950, and told them that they would be advised from time to time of any developments of importance which might take place as a result of the appointment of a negotiating committee which had been appointed at the meeting of October 24, 1950 for the purpose of negotiating with the Central of Georgia Railway Company for the sale or lease to the Central of the properties of South Western Railroad, and to negotiate with other railroad companies looking toward the acquisition by such companies of the properties of South Western Railroad.

On November 1, 1950, President Wright went over to see Mr. T. M. Cunningham, General Counsel for the trustee of the Central of Georgia Railway Company, and to his surprise learned from Mr. Cunningham that it was not the intention of the Central to write a new formula, but it was its intention to employ the formula which had been formerly used in the South Western matter in its operations from June 19, 1940 to July 1, 1943, and that the question would be raised by the Central's billing South Western for the amount claimed to be due thereunder.

On December 5, 1950, a conference was held between the aforesaid negotiating committee and officials and counsel of the Central of Georgia Railway Company and further negotiations were held subsequent to that date. But on the 16th day of January, 1951, the Central without any notice to the negotiating committee, sent out directly to the stockholders of South Western a letter proposal to purchase a majority of the stock of South Western from its stockholders under the terms of a depositary agreement dated January 1, 1951, and subject to the approval of the Interstate Commerce Commission. No one of your petitioners deposited his or her or its stock, or has agreed to sell it.

In the meantime, the Congress of the United States had adopted an amendment to the Excess Profits Tax Act which is now Section 441(j) of the Internal Revenue Code, which enhanced South Western's potential ability to pay a dividend.

40.

On March 8, 1951, the annual meeting of stockholders of South Western was held. By the use of proxies obtained for that purpose, the Central of Georgia Railway Company dominated that meeting. Prior to that time, L. O. Benton, Jr. and J. B. Ilges, Jr. had been directors of South Western. Director Ilges had sold his stock and was no longer eligible, and had resigned as a director. Director Benton was displaced by the use of the proxies obtained by the Central of Georgia Railway Company.

41.

At the stockholders' meeting of South Western of March 8, 1951, there was introduced a resolution, the preamble of which recited that the Central contended that the properties of South Western were being operated by Central under the bankruptcy formula and that therefore a grave dispute and difference exists between the management of South Western and the present management of Central, and that the officers of South Western had correctly taken the opposite view to that of Central's officers. The resolving clause directed the officers of South Western immediately to take such legal action as might be necessary to have this question judicially determined.

When this resolution was offered, Director A. Pratt Adams, who had been elected a director on the 9th day of March, 1950, suggested that it might transpire that when Mr. William Wyer made his report to the directors, that it was inadvisable to take any legal action with respect to the formula, and the resolu-

tion was amended by adding thereto: "When and if the officers are advised by William Wyer . . . that, in his opinion, the so-called bankruptcy formula is not a formula which should be applied to operations since July 1, 1948."

42.

About the middle of May, 1951, Mr. William Wyer told Mr. Wallace Miller, Vice President and Counsel of South Western, that he did not consider the formula fair and that if he were asked he would give his reasons therefor. He did not give all the reasons but told Mr. Miller what his final conclusion was as to the fairness of the formula, and that it was not a fair formula.

43.

Although your petitioners and other former stockholders of South Western have steadfastly and at every opportunity insisted that South Western Railroad Company and its officers, directors and counsel take legal action to have the question of the applicability and fairness of the bankruptcy or segregation formula determined, no such legal action has been instituted.

44.

On February 23, 1953, the directors of the South Western Railroad Company transmitted to its stockholders a report in which it was stated that it was the considered belief of the directors that the welfare of South Western demands a judicial determination

of all controversies between South Western and Central arising out of Central's operation of South Western for the past four years and eight months, and in which it was stated that the directors had authorized South Western's counsel to do whatever he deems necessary to protect the interests of the stockholders. Nothing has been done by said counsel.

45.

As hereinabove alleged, on January 16, 1951, the Central without any notice to the negotiating committee sent out directly to the stockholders of South mittee sent out directly to purchase a majority of the stock of South Western from its stockholders under the terms of the depositary agreement therein alluded to. On January 22, 1951, Central of Georgia Railway Company applied for authority under Section 5(2) of the Interstate Commerce Commission Act as amended to acquire control of South Western Railroad Company through a purchase of a majority of its capital stock.

On January 23, 1951, L. O. Benton Jr. and Wallace Miller who constituted the negotiating committee appointed by the Board of Directors of South Western to negotiate with the Central of Georgia for the acquisition or operation of South Western Railroad Company, sent a letter to the stockholders of South Western Railroad Company, a copy of which is hereto attached marked Exhibit A.

At that time Mr. Wallace Miller was vice president and general counsel of South Western Railroad Company.

Certain stockholders of South Western intervened in objection to the grant of the application. Hearings were held before Division 4 of the Interstate Commerce Commission on March 1 and 2, 1951 and June 4, 1951. A proposed report was filed by the Examiner recommending that the application be granted. Exceptions were filed thereto by the interveners. An argument was had thereon before Division 4 of the Commission. On March 4, 1952, Division 4 promulgated an order providing that the proceeding be reopened for the receipt of further evidence as to a just and reasonable compensation for acquisition of the stock of South Western Railroad Company. Those of South Western's stockholders who were objecting to the order of the Commission sought, made every effort, to have South Western Railroad Company furnish information as to the value of its stock and petitioned the Interstate Commerce Commission to compel it to intervene and furnish the information. South Western Railroad Company refused to arrange to furnish the information and the Interstate Commerce Commission refused to compel it to furnish it.

46.

Therafter, a further hearing was held on August 11, 1952 before the Interstate Commerce Commission. Subsequently, the Examiner again reported in favor of the grant of the application. Exceptions were filed. By stipulation the exceptions were heard before the full Commission on January 9, 1953. On March 2, 1953, the Interstate Commerce Commission with one Commissioner not participating and another dissenting, promulgated an order authorizing Central of Georgia Railway Company to acquire control of South

Western Railroad Company through ownership of a majority of its capital stock.

47.

Thereafter, to-wit on the 20th day of March, 1953, certain stockholders of South Western Railroad Company, including some of your petitioners, filed in the District Court of the United States for the Middle District of Georgia, their action to enjoin, set aside, annul and suspend the aforesaid order of the Interstate Commerce Commission of March 2, 1953. The said action was filed pursuant to Title 28, U.S.C. Section 1336; Title 49 U.S.C. Section 17(9); and Title 28 U.S.C. Sections 2321 et sequitur.

As provided by law the action was heard before a three-Judge Federal Court comprised of Circuit Judge Robert B. Russell and District Judges T. Hoyt Davis and A. B. Conger.

48.

On August 24, 1953 the three-Judge Court filed its opinion and order denying the prayers of plaintiffs' petition, dissolving the temporary restraining order theretofore granted, and dismissing the complaint. The opinion will be found in 114 Federal Supplement page 37.

49.

Subsequently, Central of Georgia Railway Company acquired by purchase at $75 per share, by February 25, 1954, approximately 97% of South Western stock.

50.

On February 25, 1954, the officers and directors of South Western Railroad Company were as follows: Irwin Denmark, Wallace Miller, Henry Lamar, IV, Andrew Lyndon, Hugh English, Benjamin T. Rawlings, Pratt Adams, Jr., and Lorton Livingston.

51.

On February 25, 1954, Mr. Wallace Miller, then president of South Western Railroad Company, submitted to the stockholders thereof a report on the affairs of the company for the calendar year 1953, a copy of which is hereto attached marked Exhibit B, omitting therefrom the statements referred to in the first paragraph of the report.

52.

On March 11, 1954, the regular annual meeting of the stockholders of South Western was held and at it all of South Western's directors and its counsel were removed and replaced by Central's officers and counsel.

Your petitioners had by telegram dated March 11, 1954, attempted to authorize Charles J. Bloch, Esquire, and L. O. Benton, Jr., Esquire, to act as their proxies and attorneys in fact in all matters at the aforesaid meeting of stockholders of South Western Railroad Company. The proxies were not permitted to vote at the said meeting for the reason that the proxy was not filed more than 24 hours prior to the meeting as required by a rule of the South Western

Railroad Company. Therefore your petitioners could not vote the stock owned by them at said meeting.

53.

At said meeting by a vote of the stock owned by Central of Georgia Railway Company, Mr. B. J. Tarbutton who was and is president of the Central of Georgia Railway Company, was elected president of the South Western Railroad Company.

At said meeting the following were elected to comprise the Board of Directors of South Western Railroad Company, all of whom are officers or employees of Central of Georgia Railway Company, to-wit: A. W. Ledbetter, E. F. Bidez, H. M. Groghan, W. E. Dillard, H. L. Fulton, Jr., A. R. Lawton and H. L. Perkins.

54.

At said meeting there was also introduced and passed by a vote of the Central stock, a resolution authorizing the execution of a contract for the operation of the properties of the South Western by the Central of Georgia. A copy of this resolution is hereto attached marked Exhibit C.

55.

Thereafter, there was executed a so-called agreement between South Western Railroad Company and Central of Georgia Railway Company, a copy of which is hereto attached marked Exhibit D which is the agreement referred to in paragraph 8 of Exhibit C as "an operating agreement."

56.

Thereafter, to-wit, on May 3, 1954, your petitioners transmitted to South Western Railroad Company and to B. J. Tarbutton, Esquire as president of the South Western Railroad Company, a letter a copy of which is hereto attached marked Exhibit E.

57.

On or about May 13, 1954, your petitioners received a reply to this letter signed by Mr. B. J. Tarbutton, a copy of which letter is attached hereto marked Exhibit F.

58.

The resolution adopted by the stockholders of South Western Railroad Company at the meeting of March 11, 1954 authorizing the execution of the contract exhibited to this petition as Exhibit D was beyond the powers of the corporation and the stockholders and is void.

59.

Under the laws of the State of Georgia a railroad corporation cannot without special authority of statute alienate its franchise or property essential to the performance of its duty to the public, whether by sale, mortgage or lease.

60.

Under the laws of the State of Georgia, the South Western Railroad Company has no legal authority or

right to execute, enter into or otherwise bind itself by the contract exhibited to this petition as Exhibit D, and it is ultra vires and void.

61.

Neither the charter of South Western Railroad Company nor any amendment thereto makes any provision which would permit that company to lease its properties to any other company in the manner proposed by the contract aforesaid, nor does its charter permit it to contract with another corporation for the operation of its properties in the manner proposed by said contract.

62.

In 1933 the General Assembly of Georgia enacted a statute now codified as Sections 94-328 and 94-329 of the Code of Georgia which are as follows:

"94-328. Authority to sell or lease railroad.—Any railroad corporation organized under the laws of this State which has heretofore leased its property for a long term of years to another corporation which lease has terminated and the lessor is not a going concern or equipped to conduct the operations of a railroad company is hereby authorized to sell or lease its property rights and franchises to another railroad corporation upon such terms as may be agreed upon by the board of directors of the selling or lessor corporation and assented to by the holders of a majority of its stock. (Acts 1933 p. 235)

"94-329. Rights acquired.—The railroad corporation to which a sale or lease is made under the terms of the preceding section shall acquire all the property rights and franchises of the selling or lessor corporation. (Acts 1933 p. 235)"

63.

These sections are not applicable to the South Western, were not intended by the General Assembly of Georgia to apply to the South Western; were not intended by the General Assembly to amend the charter of South Western and if so intended, have not been accepted as a part of the charter by the stockholders of the South Western Railroad Company.

64.

If the said sections of the Code should be construed by the Court to be applicable to the present situation of South Western, and the actions of a majority of its stockholders, they could not regulate a lease of the properties of South Western, as they would be unconstitutional and void as being in violation of Article I, Section X, paragraph I of the Constitution of the United States (Code Section 1-134), which provides: "No State shall . . . pass any . . . law impairing the obligation of contracts," and of Article I, Section III, paragraph II of the Constitution of the State of Georgia (Code, Ann. Section 2-302), which provides: "No . . . law impairing the obligation of contracts . . . shall be passed."

65.

The charter granted to the South Western by the General Assembly of Georgia, and accepted by it, is a contract between the State of Georgia and the South Western Railroad Company, and its stockholders, the benefits of which inure to the stockholders, including the plaintiffs, and the obligation of which cannot be impaired by the sections of the Code above referred to, or any other act of the General Assembly.

66.

For a railroad corporation to permit another railroad corporation to operate its properties is not permitted by the laws of Georgia, and any contract having that purpose and object is null and void.

67.

The execution of the contract aforesaid, and operations of the properties of South Western by Central under it constitute acts beyond the powers of the South Western injurious to your petitioners.

68.

The execution of the contract aforesaid, and the operations of the properties of South Western by Central under it constitutes such a transaction as will result in serious injury to the South Western Railroad Company, and its stockholders other than Central of Georgia Railway Company.

69.

Central of Georgia Railway Company as majority stockholder of South Western Railroad Company is by procuring the execution of the aforesaid contract and operating the properties of South Western under it, oppressively and illegally pursuing in the name of South Western Railroad Company, a course in violation of the rights of the stockholders, which can only be restrained by a Court of equity.

70.

Petitioners have acted promptly, they have made an earnest effort to obtain redress at the hands of the officers, directors and stockholders of South Western, although those efforts were doomed to futility when commenced by reason of the fact that the President, and other officers and agents of Central of Georgia Railway Company are respectively the President and Board of Directors of South Western.

71.

The election of the President and Board of Directors of South Western on March 11, 1954; the passage of the Resolution exhibited hereto as Exhibit C; the execution of the contract exhibited hereto as Exhibit D; and the attempted operation of the properties of South Western Railroad Company purportedly under that contract, constitute the latest effort of the Central of Georgia Railway Company to control South Wesern Railroad Company in a manner destructive of the latter company, and the rights of other stockholders of South Western.

72.

Over a period of years prior to March 11, 1954, the following events had occurred:

(a) The Central of Georgia Railway Company was placed in reorganization under Section 77 of the Bankruptcy Act in 1940;

(b) In 1944, a plan of reorganization was promulgated by the Interstate Commerce Commission by the terms of which Central of Georgia Railway Company was authorized to acquire the physical properties of South Western upon terms which have been hereinbefore alleged;

(c) In 1944, 1945 and 1946, stockholders of South Western adopted resolutions substantially to this effect:

"Resolved by the stockholders of South Western Railroad Company that the terms of purchase proposed by the Trustee are hereby declared to be grossly unfair and inadequate to South Western and are hereby unhesitatingly rejected;

(d) In the early part of March, 1947, certain stockholders of South Western learned that it was contemplated that the directors to be elected at the March 1947 stockholders' meeting of South Western were going to have a meeting immediately following the stockholders' meeting, and recommend to the stockholders the acceptance of the plan of reorganization:

(e) The day after the stockholders' meeting, the officers and directors of South Western recommended the acceptance of the plan—the same one which had for three years been condemned as grossly unfair and inadequate to South Western;

(f) On March 25, 1947, L. O. Benton and others instituted a suit in this Court to prevent the sale of South Western's properties to Central;

(g) While that litigation was pending, on March 5, 1948, the District Court of the United States for the Southern District of Georgia, the Court in which Central's reorganization was pending, ordered the Central after July 1, 1948, to operate the properties of South Western for the account of South Western subject to the jurisdiction of that Court. That order did not specify any rental to be paid South Western for its properties, nor did it prescribe any formula for the operation; South Western did not appeal from this order;

(h) Prior to December 21, 1949, it was learned by South Western that Central was contending that its operations of South Western's properties was under the aforesaid "bankruptcy formula" which had not been used since 1943;

(i) At a meeting of South Western's Board of Directors held on December 21, 1949, L. O. Benton, Jr. introduced a resolution instructing Vice President Wallace Miller to notify the Central that the report showing the results of operations of South Western by Central from July 1, 1948, to April 30, 1949, was neither acceptable so far as the formula was con-

cerned, nor the application of the formula, and that the report was received as information only. Mr. Benton moved the adoption of the resolution. His motion was seconded by Mr. B. J. Tarbutton, then a Director of South Western; now President of Central;

(j) On December 28, 1949, a letter conveying South Western's position was sent to Central, and similar letters were sent March 10, 1950 and July 21, 1950.

(k) The litigation commenced by Benton on March 25, 1947 (see subparagraph (f) supra), terminated October 9, 1950 with the refusal of the United States Supreme Court to review the decision of the Georgia Supreme Court which had held that the Central could not acquire South Western in the manner contemplated by the plan;

(l) October 24, 1950, a special meeting of the Board of Directors of South Western was held "for the purpose of considering the present status of South Western Railroad, resulting from the termination of litigation in the case of Benton, et al., versus South Western . . ."

(m) At that meeting, the President of South Western was authorized to employ William Wyer and Company "to represent South Western Railroad Company in the preparation and adoption of a segregation formula, to be applied to the operation of South Western Railroad Company by the Central of Georgia Railway Company from July 1, 1948 to date, and to be applied to the operation of South Western Railroad Company by the Central of Georgia Railway Company in the future so long as such operation shall

remain in effect; to represent South Western . . . in the application of said formula from July 1, 1948, to December 31, 1950, and thereafter from time to time, so long as South Western's railroads are operated for the account of South Western by Central of Georgia Railway Company." Subsequently, William Wyer & Company were so employed;

(n) At the same meeting, a committee was appointed by the President of South Western, consisting of L. O. Benton, Jr. and Wallace Miller to negotiate with the Central for the sale or lease to Central of the properties of South Western, and to negotiate with other railroad companies looking toward the acquisition by such companies of the properties of South Western; at the same meeting, the Board employed Charles J. Bloch, who had been counsel for Benton in his litigation, as special counsel to advise and assist the committee in its activities;

(o) On December 5, 1950, that committee met with Messrs. Callaway and Cunningham, officials of Central of Georgia. The meeting adjourned without any agreement, presumably to have been resumed;

(p) About December 20, 1950, Central appointed a committee from its directors to consider purchasing South Western stock. Although Mr. Cunningham saw Mr. Miller on December 22, he told him nothing about that move;

(q) January 11, 1951, after having talked with large stockholders, banks who held stock as trustees, not as their own; President Tarbutton of Central, and Mr. Jenkins a director of Central who controlled

12,000 shares, Central decided to offer $75.00 a share for South Western stock; they did not advise the negotiating committee of this or attempt to channel the offer through that committee to South Western's stockholders, but hired for a fee of $15,000.00 a brokerage company to solicit deposits of stock. That company did not advise the stockholders of the prospective earnings of South Western in 1950 and 1951 nor did they advise stockholders of the amendment to the Excess Profits Tax Act which enhanced South Western's potential ability to pay dividends.

(r) January 22, 1951, Central filed with the Interstate Commerce Commission its application to acquire control of South Western by majority stock ownership after having sent out to stockholders of South Western a proposal to acquire the stock at $175.00 per share. At that time South Western had approximately a million dollars of liquid assets, stocks, bonds, and cash. South Western had not paid a dividend to its stockholders since July 1, 1948. The offer of Central was conditioned on none being paid, or if paid, credited on the purchase price. Messrs. Miller and Benton then sent out their letter of January 23, 1951.

(s) Certain minority stockholders filed objections to Central's application including some of your petitioners, and L. O. Benton, Jr.

(t) A hearing was held before an Examiner of the Interstate Commerce Commission on March 2, 1951. The Examiner was asked to bar the use by Central of depositary proxies at the stockholders' meeting of South Western to be held March 8, 1951.

(u) The Examiner refused to bar the proxies, but Central instead of relying upon them hurriedly obtained other proxies which enabled them to dominate the meeting of March 8, 1951.

(v) South Western's directors at that time were T. I. Denmark, Andrew J. Lyndon, Wallace Miller, A. Pratt Adams, Jr., Benjamin T. Rawlings, Anton P. Wright, Ex-officio, L. O. Benton, Jr., J. P. Illges, Jr. Mr. Illges had sold his stock, was no longer eligible, and had resigned. Instead of Mr. Illges and Mr. Benton, Mr. Henry J. Lamar, IV and Lorton S. Livingston were elected. Mr. Wright was reelected President.

(w) It was at that meeting that the resolution was passed directing the officers of South Western to take such legal action as might be necessary to have the disputed question between Central and South Western as to the operation of South Western by Central judicially determined when and if the officers were advised by Mr. William Wyer that in his opinion the so-called bankruptcy formula is not a formula which should be applied to operations since July 1, 1948.

(x) Within a few weeks, William Wyer so advised the officers but no legal action was instituted although it repeatedly was requested by stockholders who did not wish to sell their stock.

(y) When during the course of the hearings before the Interstate Commerce Commission, it requested additional evidence as to the value of South

Western stock, the officers and directors of South Western refused to expend corporate funds for that purpose.

(z) March 2, 1953, the Interstate Commerce Commission entered an order on Central's application, authorizing the acquisition of control of South Western Railroad Company by Central, through ownership of a majority of its stock at $75.00 per share.

(aa) August 24, 1953, litigation with respect to that order ended, and thus Central acquired stock control.

(bb) December 21, 1953, Central made a demand upon South Western for payment of all additions and betterments placed on South Western's properties by Central since July 1, 1948.

(cc) South Western refused this demand upon grounds set out in the Report of the Board of Directors of the South Western for the Calendar Year 1953, (Exhibit E hereto), but took no steps even then to have a judicial determination of the differences between South Western and Central.

(dd) January 20, 1954, South Western's directors were notified by Central that at the regular annual meeting of stockholders of South Western to be held on March 11, 1954, all of South Western's Directors and its counsel would be removed and replaced by Central's officers and counsel.

(ee) Despite that notice, and the lapse of some eight weeks between it, and March 11, 1954, no legal action was instituted by South Western seeking such

judicial determination or the determination of the other questions involved in the refusal by South Western of Central's demand.

73.

Your petitioners aver that until a judicial determination of all differences between South Western and the Central arising out of Central's operation of South Western has been had to the end that the reasonable and fair rental value of Central's use and enjoyment of South Western's railroads and other properties since July 1, 1948 and in the future until further order of this Court may be ascertained, that the continued operation by Central of South Western's properties under the contract exhibited hereto as Exhibit D would be destructive of the South Western, and the rights of its stockholders other than Central, and will result in serious injury to the company and other stockholders, and such operation should be restrained and enjoined by this Court.

74.

Your petitioners aver that until such judicial determination, Central should be restrained and enjoined from disposing of any assets of South Western, and the South Western restrained and enjoined from permitting, acquiescing in, or joining in such disposal.

75.

The balance sheet of the South Western Railroad Company which is a part of the Report of its Board of Directors for the calendar year 1953 shows that

the common capital stock of South Western has a book value of $275.00 per share. Under the so-called "operating agreement," share holders would receive $3.00 per share per annum which is so grossly inadequate as to demonstrate in and of itself that the so-called operating agreement, and operations under it would be for the sole advantage of Central of Georgia Railway Company and would result in serious injury to stockholders other than Central of Georgia Railway Company, and would be destructive of the rights of such other stockholders.

76.

Your petitioners further show that on December 31, 1953, South Western Railroad Company owned Bonds, Notes, and certificates of indebtedness as follows:

Bonds	Market Value
City of Savannah, Georgia	20,710.00
City of Dothan, Alabama	10,400.00
U. S. Treasury Bonds, 1956-9	198,875.00
U. S. Treasury Bonds, 1967-72	154,350.00
U. S. War Savings Bonds, Series "G"	48,200.00
U. S. Treasury Bonds	24,937.50
U. S. Treasury Notes, Series "A"	29,925.00
U. S. Treasury Certificates of Indebtedness	754,151.87
Total	$1,241,549.37

77.

Your petitioners are advised that said Bonds, notes and certificates of indebtedness together with cash in

the amount of approximately $35,000.00 were on or about March 12, 1954 delivered by the retiring treasurer of South Western Railroad Company to the officers and directors elected at the meeting of March 11, 1954.

78.

Your petitioners aver that South Western Railroad Company should be required by order and decree of this ourt to render an accounting as to whether or not any of said securities or cash have been expended and if so, for what purpose, and if any portion thereof has been delivered to Central of Georgia Railway Company in satisfaction of any alleged indebtedness due to it by South Western that Central of Georgia Railway Company should be required to restore such amount to South Western Railroad Company pending a final determination of all differences between South Western and the Central.

79.

Your petitioners aver that on April 8, 1954, by order of the District Court of the United States for the Southern District of Georgia a portion of the order of March 5, 1948 was rescinded.

A copy of the order of April 8, 1954 is hereto attached marked Exhibit G.

80.

Your petitioners bring this proceeding in equity in behalf of themselves, and other stockholders similarly situated, and pray:

(a) That process may issue requiring the defendants and each of them to appear and answer this complaint;

(b) That it be decreed by this Court that the so-called "operating agreement" is ultra vires, null and void, and that the properties of South Western may not be operated by Central of Georgia Railway Company under its terms;

(c) That it be decreed by this Court that the so-called "operating agreement" and operations under it are transactions which will result in serious injury to South Western Railroad Company, your petitioners and other stockholders similarly situated;

(d) That the so-called operating agreement be canceled;

(e) That it be decreed by this Court that the so-called operating agreement and operations under it constitute a course oppressively and illegally pursued in the name of South Western Railroad Company by the majority stockholder Central of Georgia Railway Company which course is in violation of the rights of your petitioners and other stockholders similarly situated;

(f) That until a judicial determination of all differences between South Western and Central of Georgia Railway Company, arising out of Central's operation of South Western's properties has been had to the end that the reasonable and fair rental value of Central's use and enjoyment of South Western's railroads since July 1, 1948 and in the future until further order of this Court, has been ascertained, that the operation by Central of Georgia Railway Company of South Western's properties under the so-called operating agreement be restrained and enjoined.

(g) That until such judicial determination, Central of Georgia Railway Company, its officers, agents and employees, and South Western Railroad Company, its officers, agents and employees be restrained and enjoined from disposing of or changing the status of any assets of South Western Railroad Company;

(h) That South Western Railroad Company, its officers, agents and employees render an accounting as to whether or not any of the securities described in the complaint or the cash mentioned therein have been expended, and if so for what purpose;

(i) That if any portion thereof has been delivered to Central of Georgia Railway Company in satisfaction of any alleged indebtedness alleged to be due it by South Western, or otherwise, that Central of Georgia Railway Company be required to restore such to South Western Railroad Company pending a final determination of all differences between South Western and Central of Georgia Railway Company;

(j) For such other and further relief as to the Court may seem meet and proper.

BLOCH, HALL, GROOVER & HAWKINS,
(Bloch, Hall, Groover & Hawkins),
Attorneys for Petitioners.

Serve C. of Ga. R. R. Co.

EXHIBIT A.

Anton P. Wright, President
Savannah, Ga.

Andrew J. Lyndon
Sec. & Treas.
Macon, Georgia

Wallace Miller
Vice-President
Macon, Ga.

South Western Railroad Company
404 Bankers Insurance Building
Macon, Ga.

January 23, 1951

To the Stockholders of the South Western Railroad Company:

You have doubtless received from Central of Georgia Railway Company an offer dated January 16, 1951, to buy a majority of the stock of South Western Railroad Company for $75 cash per share, subject to certain terms and conditions.

By action of the Board of Directors of South Western Railroad Company on October 24, 1950, L. O. Benton, Jr. and Wallace Miller, Sr. were appointed as a committee to negotiate with the Central of Georgia for the acquisition or operation of the South Western Railroad Company in lieu of the proposed purchase which had been nullified by Court proceedings.

The stockholders of South Western were immediately advised of this appointment. As promptly as we could get an engagement with the proper officials of the Central we commenced these negotiations.

While these negotiations were under way the officers of the Central went over the head of the committee and South Western's Board of Directors and transmitted the letter and proposal of January 16, 1951, directly to the stockholders of South Western. They evidently considered this course good policy.

We feel it our duty to advise the stockholders of South Western that this offer was not transmitted with the approval of the committee.

In our opinion, shares of stock in South Western Railroad Company, under existing conditions, are worth more than $75 per share. We think so for the following reasons, among others:

(1) Seventy-five dollars a share is less than the shareholders of South Western would have received per share under the original plan of reorganization, taking into consideration today's market for Central's bonds.

Based on today's market for Central of Georgia First Mortgage Bonds and Income Series B. Bonds, and counting the assets in the treasury of South Western Railroad Company, the value of a share of South Western Railroad Company stock today, even under that offer, would be $87.05.

(2) The Central of Georgia Railway Company is now making money from operations, and so is the South Western.

(3) South Western's revenue from operations should substantially increase in the very near future by reason of the construction at Albany, Georgia, of the U. S. Marine Corps Depot.

(4) South Western's ability to pay dividends in excess of five per cent per annum has been made possible by a provision in the new Excess Profits Tax Law which enables South Western to include in its invested capital the value of additions and betterments which were made to South Western's properties by its lessees from December 1, 1869, to July 1, 1948, thus more than doubling its exemption from the excess profits tax.

(5) Because during the negotiations your committee was offered First Mortgage Bonds and General Mortgage Income Bonds and cash by the Central having a market value today of $88.67.

We write this letter because we believe it to be our duty to the stockholders, so that you will be advised that the proposal made by the Central was not the result of any negotiations with this committee.

Respectfully yours,

(S.) L. O. BENTON, JR.,

(S.) WALLACE MILLER.

EXHIBIT B.

To the Stockholders of the South Western Railroad Company:

Your Board of Directors submits the following report on the affairs of your company for the calendar year 1953. As a part hereof are comparative statements of the General Balance Sheet; Details of Securities Owned; Cash Receipts and Disbursements; Profit and Loss Account and Income Account of the South Western Railroad Company for the period January 1 to December 31, 1953-52.

Under date of February 23, 1953, you were informed in the annual report of your Directors, that at the time of the printing of the annual report no decision by the Interstate Commerce Commission had been announced upon the application of the Central to acquire stock control of South Western at a price of $75 per share.

On March 2, 1953, the Commission entered an order on Central's application, authorizing the acquisition of control of South Western Railroad Company by Central, through ownership of a majority of its stock at $75 per share.

Mr. L. O. Benton, Jr. and other South Western stockholders sought to enjoin and set aside the Commission's order in the District Court of the United States in a proceeding before a three-Judge Court, obtaining a temporary restraining order.

On August 24, 1953, the three-Judge Court filed its opinion and order, denying the prayers of plaintiff's petition, dissolving the temporary restraining order theretofore granted, and dismissing plaintiff's complaint. No appeal was taken from this order.

Subsequently, Central has acquired by purchase, at $75 per share, approximately 97% of South Western's stock.

In the annual report dated February 23, 1953, the stockholders were advised that Central then held the following claims against South Western:

Deficit in operation through July 31, 1952 ..	$559,544.15
Additions and betterments placed upon South Western's property through December 31, 1952	204,008.13
Refund of taxes obtained by South Western for the years 1947 and 1948	168,000.00
Total	$931,552.28

Central's monthly reports to South Western of the results of operation under the segregation formula show net income from August 1, 1952. to July 31, 1953, to be $2,542.43; additions and betterments placed on South Western's properties from January 1, 1953, to July 31, 1953, to be $75,205.68.

So it is that Central's claims against South Western (the latest figures available) are:

Deficit in operation through July 31, 1953 ..	$ 557,001.72
Additions and betterments through December 31, 1953	514,419.68
Refund of taxes obtained by South Western for years 1947 and 1948	168,000.00
Total	$1,239,421.40

On December 21, 1953, Central made a demand upon South Western for payment of all additions and betterments placed on South Western's property by Central since July 1, 1948.

South Western refused this demand on the following grounds:

In the opinion of its counsel, Central's operation of South Western since July 1, 1948 has not been and is not now an operation authorized by the Bankruptcy Act.

The reorganization Court was without jurisdiction to enter the order of March 5, 1948, with respect to the operation of South Western by Central for the account of South Western.

The bankruptcy formula is not a proper or reasonable formula to be applied by Central to South Western's operations since July 1, 1948, to determine South Western's net income or loss from operation.

If it should be determined that the bankruptcy formula is a reasonable and proper formula to be applied to South Western's operations, then the limitation in the formula of $50,000, for any annual period, of operating deficits, including additions and betterments chargeable to South Western, should be given effect.

A judicial determination of all differences between South Western and the Central, arising out of Central's operation of South Western should be had, to the end that the reasonable and fair rental value of

Central's use and enjoyment of South Western's railroads since July 1, 1948, may be ascertained.

On January 20, 1954, South Western's Directors were notified by Central that at the regular annual meeting of stockholders of South Western to be held on March 11, 1954, all of South Western's Directors and its counsel would be removed and replaced by Central's officers and counsel.

Respectfully submitted for the Directors.
WALLACE MILLER,
President.

EXHIBIT C.

South Western Railroad Company

Stockholders' Meeting March 11, 1954

Resolution Authorizing Execution of a Contract for Operation of the Properties of South Western Railroad Company by Central of Georgia Railway Company

Whereas:

1. This Company owns a railroad and has been given by the State of Georgia a franchise to operate it.

2. The Interstate Commerce Commission has found that it is in the public interest that said railroad be

operated as a part of the system of Central of Georgia Railway Company, at the heart of which it lies.

3. The Supreme Court of Georgia has held that this Company may not sell its railroad and franchises to Central of Georgia Railway Company or to any other corporation except on the unanimous approval of this Company's stockholders, which it is obviously impossible to secure.

4. The operation of this Company's railroad by Central of Georgia Railway Company for the account of this Company has resulted over a period of approximately five and a half years, in annual operating deficits and large claims against this Company for Additions and Betterments put on this Company's railroad, so that this Company and its stockholders have received no income from the operation of its properties but have, on the contrary, incurred a large debt.

5. This Company desires to accomplish the continued operation of its property in the public interest and in the fulfillment of its obligations to the State of Georgia and at the same tiime realize a reasonable revenue therefrom.

6. This Company knows of no way to accomplish these things except by making an agreement with Central of Georgia Railway Company for the operation of this Company's property under terms and conditions which are satisfactory to both parties.

7. Such an agreement cannot take effect until it has been approved by the Interstate Commerce Commission.

8. An operating agreement which has the approval of the Central of Georgia Railway Company has been submitted to this Company for approval.

It is, therefore

Resolved, that the proper officers of this Company are authorized and directed to execute an operating agreement with Central of Georgia Railway Company in substantially the form submitted to this Company, a copy thereof being attached to and made a part of the minutes of this meeting; provided that said agreement shall not take effect until it has been approved by the Interstate Commerce Commission and by any administrative, or any judicial, body, having jurisdiction in the premises and shall, upon said approval, take effect as of midnight on December 31, 1953, and provided further that said agreement shall reserve to this company the right of cancellation in the event that this Company should determine that it is financially able to operate its property and desires to do so.

EXHIBIT D.

This Agreement, between South Western Railroad Company, hereinafter called the "South Western" and Central of Georgia Railway Company, hereinafter called the "Central," both being Georgia corporations.

Witnesseth:

1. By order of the United States District Court for the Southern District of Georgia, Savannah Division,

in proceedings for the reorganization of the Central of Georgia Railway Company dated March 5, 1948 (Document No. 552) it was provided that the lease agreement dated October 17, 1895, by which the South Westerr leased its properties to the Central, was rejected as of July 1, 1948, and that after that time the Central should operate the lines of the South Western for the account of the latter, subject to the jurisdiction of the Court.

2. The parties hereto desire to substitute the operation of the properties of the South Western under this agreement for their operation for account of the South Western under the Court order hereinbefore referred to, and have procured from the United States District Court for the Southern District of Georgia an order vacating as of midnight December 31, 1953 so much of that Court's order of March 5, 1948 referred to in the preceding paragraph as requires the Central to operate the lines of the South Western for the account of the latter and subject to the jurisdiction of the Court, when and if this agreement or one substantially similar thereto is approved by the Interstate Commerce Commission. It is, therefore, agreed as follows:

3. As of Midnight December 31, 1953 the South Western appoints the Central its Agent to operate the property herein described and agrees that, when this agreement has been approved as described in Section 10 hereof, it will surrender to the Central as of Midnight December 31, 1953 to be operated by the Central in accordance with the terms of this agreement all of the South Western's tangible real and personal property (except its cash, stocks, bonds,

debentures and other investment securities) which are or may be used or useful in connection with the operation of its railroad as a common carrier, together with the appurtenances thereto. Without affecting the generality of the foregoing, the foregoing description includes all of the South Western's tracks and the rights of way therefor, its real property and the improvements thereon, its buildings on land which the South Western does not own, its terminals and terminal facilities and its depots, warehouses and yards. In order to facilitate the operation by the Central, the South Western hereby assigns to the Central all of its right, title and interest in all properties and facilities used singly or jointly by the South Western in its common carrier operations under agreements with other railroads, and also all of its right, title and interest in any and all agreements, leases and easements which pertain to any of the South Western's property which is to be operated by the Central.

4. (1) As of midnight December 31, 1953, the Central's books covering the operation of the South Western's railroad properties for account of the South Western Railroad Company will be closed and from that day and for the duration of this agreement the operation of the South Western's properties described in Section 3 hereof will be in accordance with the terms of this agreement (and in accordance with any terms and conditions which the Interstate Commerce Commission might prescribe) as an integral part of the Central's railway system, and the Central as the South Western's agent will have exclusive possession and control of all of South Western's properties described in paragraph 3 hereof and may exercise all

rights, privileges and control over said property which the South Western could have exercised if this agreement were not made, except the right to convey such property or any interest therein.

(2) As long as this agreement is in effect the Central will collect and retain all income from the operation of the properties operated under this agreement, and will pay all expenses of said operation and

(a) All taxes, assessments and governmental charges, ordinary and extraordinary, other than those chargeable to investment account, which are lawfully imposed upon the South Western or its property or its income for a period which commences on or after the effective date of this agreement except intangible taxes on its cash, stocks, bonds, debentures and other investment securities and income taxes on the income derived therefrom.

(b) All rentals and other sums payable under existing agreements relating to the exclusive or joint use of any railroad facilities or appurtenances.

(c) All expenses incurred by South Western for maintaining its corporate existence, including the reasonable salaries of such officers as South Western may elect and all necessary expenses connected with keeping the books of South Western and all necessary expenses connected with keeping the books of South Western and its advertising and the transfer of stocks and incident to the meetings of its Board of Directors and stockholders,

(d) An amount equal to the difference between (a) the sum of all charges or deductions allowed the South Western under the Internal Revenue Laws for amortization and depreciation of its property and any other deductions allowed under the Internal Revenue Laws in the event of the retirement or abandonment of its property on account of casualty, obsolescence or other causes not provided for through depreciation or amortization, and (b) the amounts payable under sub-paragraph 2(e) hereof.

(e) The Central will also pay to the South Western on January 1, 1955 and annually thereafter on each January 1st, a sum equal to $3.00 multiplied by the number of shares of South Western Railroad Company's common stock which are registered on the preceding December 31st in the names of stockholders other than the Central and its affiliates, and the South Western agrees to pay the sum so received as dividends to its stockholders other than the Central and its affiliates. The Central hereby irrevocably waives for itself and its affiliates any rights which it or they as stockholders of record may have during the term of this agreement or any extension thereof to be paid cash dividends on the stock of South Western owned by the Central and its affiliates, to the extent that said dividends are paid from money received by the South Western under the provisions of this sub-paragraph (e).

5. If the Central should fail to make any of the payments herein provided for within six (6) months after they are due, the South Western's Board of Directors may terminate this agreement and enter and resume possession of the property of the South

Western being operated by the Central, whereupon this agreement shall terminate.

6. The Central will keep the property operated hereunder in as good order and repair as it is on the effective date of the approval of this agreement, ordinary wear and tear excepted, and will return said property to the South Western at the termination of this agreement, replacing such property as may have been consumed by use with similar property of equal value.

The Central is authorized to place on the South Western's property such additions and betterments as it may, in its uncontrolled discretion, consider necessary or advisable. The cost thereof will be paid by the South Western but the Central may offset against such indebtedness its own indebtedness to the South Western in respect of amortization or depreciation and any other deductions allowed under the Internal Revenue law in the event of retirement or abandonment of property on account of casualty, obsolescence or other cause not provided for through depreciation or amortization.

7. When requested by the Central, the South Western will execute such reasonable leases, easements and other agreements with third persons having to do with the property operated hereunder as the Central may consider necessary or desirable in connection with said operation. The Central shall collect and retain the income from said leases, easements and other agreements and also all sums due after the effective date of this agreement under leases, easements and other agreements then already executed.

8. The Central will indemnify the South Western and hold it harmless against all loss, damage, liability or expense which the South Western may incur or for which it may become liable as a result of the acts or omission of the Central or its employees in the operation of the property operated under this agreement.

9. Each party agrees that at any and all times after the execution of this agreement and during its continuation, it will make, execute and deliver such other conveyances, transfers and instruments in writing and do such other things as shall be necessary to give full effect to this agreement or any part thereof.

10. This agreement will not become effective until it has been approved by the Interstate Commerce Commission and by any other administrative body and any judicial body to which it may be submitted for approval but, when so approved, the effective date shall be as of midnight December 31, 1953. It shall continue in effect for one year from its effective date and thereafter from year to year unless terminated as provided in Section 5 hereof or unless the South Western terminates this agreement as of any December 31st at midnight on the ground that it is financially able to operate its property and desires to do so, and so notifies the Central in writing three (3) months before the date of termination, or unless the Central terminates this agreement as of any December 31st at midnight by giving to the South Western three (3) months' written notice of its desire to terminate.

11. This agreement is intended as an operating agreement only. It conveys to the Central no estate whatsoever in the property which is to be operated hereunder, but only such right to occupy, use and possess the same as the Central may consider necessary or convenient in the operation of the property.

In Witness Whereof, the South Western Railroad Company has caused these presents to be executed by its legally authorized Officers and its corporate seal to be attached, in accordance with a resolution of its stockholders passed on March 11, 1954, and Central of Georgia Railway Company has caused these presents to be executed by its legally authorized Officers and its corporate seal to be attached, in accordance with a resolution passed by its Board of Directors at a meeting held on February 25, 1954.

SOUTH WESTERN RAILROAD COMPANY,

By (S.) B. J. TARBUTTON,
President.

Attest:

(S.) W. F. LEACH,
Secretary.

Signed, sealed and delivered by South Western Railroad Company in our presence:

(S.) A. R. LAWTON,

(S.) J. M. WILSON,
Notary Public, Bibb County, Georgia.

CENTRAL OF GEORGIA RAILWAY COMPANY,

By (S.) B. J. TARBUTTON,
President.

Attest:

(S.) B. D. HELMKEN,
Secretary.

Signed, sealed and delivered by Central of Georgia Railway Company in our presence:

(S.) D. E. TOMPKINS,
(S.) MRS. BERNICE S. BAXTER,
Notary Public, Chatham
County, Georgia.

EXHIBIT E.

May 3, 1954

South Western Railroad Company
c/o Mr. W. F. Leach
400 Fifth Street
Macon, Georgia

South Western Railroad Company
c/o B. J. Tarbutton, Esquire
Central of Georgia Railway Company
Savannah, Georgia

B. J. Tarbutton, Esquire
President, South Western Railroad Company
Savannah, Georgia

The undersigned stockholders of South Western Railroad Company were stockholders on March 11, 1954 and have been advised that at a stockholders' meeting of said company held at Macon, Georgia on March 11, 1954, the following actions were taken:

1. Mr. B. J. Tarbutton who is President of Central of Georgia Railway Company was elected President of South Western Railroad Company;

2. A. W. Ledbetter, E. F. Bidez, H. M. Croghan, W. E. Dillard, H. L. Fulton, Jr., A. R. Lawton, and H. L Perkins, each of whom is an officer, director, agent or employee of Central of Georgia Railway Company, were electd as directors of South Western Railroad Company so as to comprise the entire Board of Directors of South Western Railroad Company. This election was entirely by the vote of stock owned by Central of Georgia Railway Company;

3. There was introduced and passed by the vote of the stock in South Western owned by Central of Georgia a resolution authorizing the execution of a contract for the operation of the properties of the South Western by the Central of Georgia;

4. A set of by-laws was adopted by the vote of the same stock.

We should like to be advised whether the officers of the South Western Railroad Company have executed the contract referred to in paragraph numbered three above.

A. If the said contract has not been executed, we request that it not be executed by South Western for the following reasons:

(a) It is in reality a lease, not within the charter powers of South Western, and violative of its charter;

(b) The contract constitutes an action or threatened action beyond the charter power of South Western;

(c) It is a transaction by which the absolute control of South Western would be placed in the hands of Central of Georgia, and therefore is a transaction between the company and its majority stockholder which would be destructive of the company, and result in serious injury to the company or to its other stockholders;

(d) A majority of the stockholders are acting in their own interests in a manner destructive of the company, or of the rights of other stockholders;

(e) The majority stockholder is oppressively and illegally pursuing in the name of the corporation, a course in violation of the rights of other stockholders.

B. If the said contract has been executed by officers of South Western, we request, for the reasons just hereinabove stated, that proper action be taken by the officers and directors to cancel it.

C. We assert that the election of Mr. B. J. Tarbutton as President of South Western is illegal, and contrary to the interests of minority stockholders in South Western. He is President of Central of Georgia Railway Company. We assert that for this reason he cannot legally serve as President of South Western. If he can serve without violation of any Federal statute, such service would nevertheless be an action of the majority stockholder in its own interest destructive of the company, or of the rights of minority stockholders.

We request that action be taken seeking or compelling his resignation and the election of a person

who has no connection with Central of Georgia Railway Company.

D. We request that action be taken seeking or compelling the resignation of the aforesaid directors, and the election of a board of directors, some of whom, at least, will not be officers, agents, directors, or employees of Central of Georgia Railway Company.

E. We further respectfully request that a judicial determination of all differences between South Western and the Central, arising out of Central's operation of South Western, be had to the end that the reasonable and fair rental value of Central's use and enjoyment of South Western's railroads since July 1, 1948 may be ascertained, and that South Western and its officers and directors, in that connection, insist that the "double rent" statute of Georgia is applicable.

F. We further respectfully request that South Western, its officers and directors, in its dealings and transactions with Central, take the positions as outlined in the report of its Board of Directors for the calendar year 1953, dated February 25, 1954, page two, these "positions" being the "grounds" upon which South Western refused Central's demand of December 21, 1953 for payment of all additions and betterments placed on South Western's property by Central since July 1, 1948.

G. On March 8, 1951, the stockholders of South Western passed a resolution in which it was recited:

That the Central of Georgia contended that the properties of South Western were being operated by

Central under the bankruptcy formula and that therefore a grave dispute and difference existed between the management of South Western and the management of Central, and that the officers of South Western had correctly taken the opposite view to that of Central's officers.

In view of that recitation, it was resolved that the officers of South Western take such legal action as might be necessary to have that question legally determined when and if the officers were advisd by William Wyer that, in his opinion, the so-called bankruptcy formula is not a formula which should be applied to operations since July 1, 1948.

Shortly thereafter William Wyer so advised the officers of South Western.

The legal action directed to be taken by the aforesaid resolution has never been instituted.

We demand that it be immediately instituted.

H. We demand that Article III of the By-Laws adopted as aforesaid be rescinded for the reasons set out hereinabove, and most particularly for the reason that South Western Railroad Company has no charter power to establish an executive committee to exercise all of the powers of the Board of Directors when the latter is not in session, and that such provision constitutes an attempt to place full and unfettered control of South Western in the hands of Central.

I. We demand that Article VII of the By-Laws adopted as aforesaid be rescinded for the reason that it is ultra vires South Western Railroad Company under its charter.

This letter is sent to you pursuant to the provisions of Section 22-711 of the Code of Georgia of 1933.

Respectfully,

BELK-SIMPSON COMPANY,
BELK'S DEPARTMENT STORE,
GREENVILLE BARGAIN HOUSE,
W. H. B. SIMPSON,
LUCY C. B. SIMPSON,
MARY ELIZABETH SIMPSON,
T. H. BOWDEN,
ANSEL M. SMITH,

By (S.) W. H. B. SIMPSON,
(W. H. B. Simpson).

EXHIBIT F.

South Western Railroad Company

Savannah, Ga., May 11, 1954

Belk-Simpson Company,
Belk's Department Store,
Greenville Bargain House,
Mr. W. H. B. Simpson,
Miss Lucy C. B. Simpson,
Miss Mary Elizabeth Simpson,
Mr. T. H. Bowdon,
Mr. Ansel M. Smith,
c/o Mr. W. H. B. Simpson,
Greenville Bargain House,
650-652 South Main Street,
Greenville, South Carolina.

Ladies and Gentlemen:

I have your joint letter of May 3rd.

The statements contained in paragraphs 1 to 4 inclusive are correct except that the election of the President and Directors was unanimous and nine shares were voted against the approval of the operating agreement, two shares not voting.

The contract to which you refer was executed by the Central of Georgia before the meeting of South Western stockholders held on March 11, 1954, and by the South Western Railroad shortly after its execution had been directed at the South Western's stockholders' meeting on that day.

In view of the foregoing statement, I do not reply to your paragraphs A(a)—(e) inc.

Since the execution of the contract in question was by direction of the stockholders, it cannot be canceled as your paragraph B requests except by direction of the stockholders. I do not expect to call a stockholders' meeting for that purpose.

Referring to your paragraph C. The Interstate Commerce Commission has authorized me to serve as President of both Companies. I do not intend to resign.

Nor do the Directors of the South Western Railroad Company who were elected on March 11, 1954, and who have also been authorized to serve, intend to resign as you suggest in paragraph D that they should do.

Since July 1, 1948, the Central of Georgia has been operating the South Western's properties under order of the United States District Court for the Southern District of Georgia for account of the South Western Railroad Company, No question of the rental value of these properties is involved, as you suggest in paragraph E.

The South Western's annual report for 1953 referred to in your paragraph F covers a period during which the Central of Georgia was a minority stockholder, because its purchase of a majority of the South Western's stock had not yet been approved by the Interstate Commerce Commission. The present Management of the South Western does not feel that the grounds on which the South Western refused the Central's demand for payment for additions and better-

ments placed on the South Western's property are sound.

The resolution referred to in paragraph G which called on the South Western to take legal action against the Central was passed March 8, 1951. By the time the Central's purchase of the majority of the South Western's stock had been approved by the Commission, three years had elapsed without any such action being taken. The present Management does not feel called upon to take that action.

I do not agree with your conclusions of law stated in your paragraphs H and I.

Yours very truly,
(S.) B. J. TARBUTTON,
President.

EXHIBIT G.

(Order)

The foregoing petition having been presented to the Court and it appearing that South Western Railroad Company has acknowledged service thereof and waived all other and further service and joins in the prayer of the petition insofar as they affect the rescission of a portion of this Court's order of March 5, 1948 (Document No. 552), and the Court being cognizant of the fact that no other parties to the reorganization proceedings except Petitioner Merrel P. Callaway, as Trustee, has any interest in the subject matter of this petition and that it is unnecessary to give any further notice of the filing of the petition,

It Is Considered, Ordered and Adjudged as follows:

1. When and if the Interstate Commerce Commission approves the application of Central of Georgia Railway Company now pending before it in Finance Docket No. 18465, and on the effective date of its order of approval, the following portion of this Court's order of March 5, 1948 (Document No. 552) will be rescinded as of midnight on December 31, 1953:

"From and after the consummation date, the Re organized Company shall operate the lines of the South Western for account of the South Western sub ject to the jurisdiction of this Court."

Central of Georgia Railway Company shall be relieved as of that date and without any further order of this Court of the duty of operating the lines of South Western Railroad Company for the account of that Company and subject to the jurisdiction of this Court.

2. When and if the Interstate Commerce Commission approves the aforesaid application of Central of Georgia Railway Company in Finance Docket No. 18465, and on the effective date of that order, Merrel P. Callaway shall be discharged as Trustee of the property of Central of Georgia Railway Company in these proceedings for the reorganization of that Company, and shall stand fully relieved of all liability as Trustee or individually for any acts or omissions of his performed or omitted in his capacity as Trustee, since the termination at 12:01 AM July 1, 1948, of the period in which he operated the properties and busi-

ness of Central of Georgia Railway Company, as Trustee, pursuant to the authority of this Court.

This April 8th, 1954.

F. M. SCARLETT,
Judge, United States District Court.

State of South Carolina,
County of Greenville.

You, W. H. B. Simpson, being duly swirn, depose and say that the averments of the foregoing petition are true.

This 17th day of June, 1954.

(S.) W. H. B. SIMPSON.

Sworn to and subscribed before me this 17th day of June, 1954.

BESS E. SHOCKLEY,
(Seal) Notary Public.

ORDER OF THE COURT.

The foregoing petition read, considered, sanctioned, and ordered filed.

Let the defendants show cause before me at the Court House in Macon, Georgia, on the 3 day of Sept., 1954 at 10 o'clock A.M. why they should not be restrained and enjoined as prayed in the petition.

It is further ordered that the defendants serve counsel for the plaintiffs with a copy of their defensive

pleadings at least ten days prior to the date set for hearing in the preceding paragraph of this order.

This 18 day of June, 1954.

(S.) MALLORY C. ATKINSON,
J.S.C.M.C.

ACKNOWLEDGMENT OF NOTICE AND SERVICE OF PETITION FOR REMOVAL.

Comes now Charles J. Bloch, a member of the firm of Bloch, Hall, Groover and Hawkins, Attorneys for the above named plaintiffs, and acknowledge due and legal notice and service of the petition filed July 10, 1954 in the District Court of the United States for the Macon Division of the Middle District of Georgia, being Civil Action No. 1156. Said Petition was for the purpose of removal to said District Court of the above stated cause, which was pending as number 17513 in the Superior Court of Bibb County, Georgia. Copy of the removal petition and related papers have been received. All other notice and service waived.

This the 10th day of July, 1954.

CHARLES J. BLOCH.

Filed July 13, 1954.

PETITION TO REMOVE CAUSE FROM THE SUPERIOR COURT OF BIBB COUNTY, GEORGIA.

(Title Omitted.)

To the Honorable Judges of the District Court of the United States for the Middle District of Georgia:

South Western Railroad Company and Central of Georgia Railway Company, the defendants in the above stated cause, file this their petition for removal of said cause from the Superior Court of Bibb County, Georgia, to the District Court of the United States for the Middle District of Georgia, Macon Division, and respectfully shows:

1.

That the named parties plaintiff, on the 18th day of June, 1954, filed in the Superior Court of Bibb County, Georgia, a certain petition, being No. 17513, in which petition the said plaintiffs sought relief against the defendants relating to the operations of the properties of the defendants, South Western Railroad Company by the defendant, Central of Georgia Railway Company. The petition of the plaintiffs was served upon each of the defendants on the 21st day of June, 1954.

2.

The controversy set forth in plaintiffs' petition arises under the laws of the United States, and the sum or value in controversy exceeds the sum of

$3,000.00, exclusive of interest and costs, and is cognizable in the Federal Courts.

3.

Said suit is a civil action in which it is sought to enjoin, set aside, annul or suspend in whole or in part an order of the Interstate Commerce Commission.

4.

Petitioners attach hereto a copy of the pleadings, processes and orders heretofore served upon them.

5.

Petitioners attach hereto a bond of good and sufficient surety, conditioned that they will pay all costs and disbursements incurred by reason of this removal proceeding, should it be determined that the case was not removable, or was improperly removed.

6.

Petitioners show that this petition is filed within 20 days after the service of the initial pleadings setting forth the claim for relief upon which such proceeding is based.

Wherefore, Petitioners pray that further proceedings in the Superior Court of Bibb County, Georgia be discontinued and this suit be removed to the United States District Court for the Middle District of Geor-

gia, Macon Division, as the law in such cases provides.

A. R. LAWTON,
GEORGE O'DONNELL,
JOHN B. MILLER.

P. O. Address:
Savannah, Ga.

WALTER A. HARRIS,
H. D. RUSSELL,
JOHN B. HARRIS, JR.,
Attorneys for Petitioners.

P. O. Address:
914 Persons Building,
Macon, Georgia.

Of Counsel:
LAWTON & CUNNINGHAM,
Savannah, Georgia.

HARRIS, RUSSELL, WEAVER & WATKINS,
Macon, Georgia.

Georgia,
Bibb County.

Personally appeared H. D. Russell, who on oath deposes and says he is a resident of said state and county. That he is one of the attorneys for the South Western Railroad Company and Central of Georgia Railway Company, the above named defendants, and is authorized to make this affidavit on their behalf. Deponent says he has read the foregoing petition and the contents are true and correct to the best of his knowledge and belief.

H. D. RUSSELL.

Sworn to and subscribed before me, this 10th day of July, 1954:

ANNA M. WEST,
(Seal) Notary Public, Georgia, Bibb County.

My Commission Expires Aug. 2, 1955.

Filed July 10, 1954.

(Title Omitted.)

Know All Men By These Presents:

That we, South Western Railroad Company and Central of Georgia Railway Company, as Principals, and Horace W. Waters, as Surety, are held and firmly bound unto W. H. B. Simpson, Lucy C. B. Simpson, Mary Elizabeth Simpson, T. H. Bowden, Ansel M. Smith, Belk-Simpson Company of Abbeville, South Caroline, Inc., Belk's Department Store of Clinton, South Carolina, Inc., The Greenville Bargain House, a corporation of the State of South Carolina, in the sum of Five Hundred Dollars ($500.00) for the payment of which well and truly to be made, and hereby bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally and firmly by these presents.

The condition of the above bond is as follows:

Whereas, the defendants in the above stated case have filed in the District Court of the United States for the Middle District of Georgia, Macon Division,

their petition for removal of said case, pending in the Superior Court of Bibb County, Georgia.

Now, if the said defendants shall pay all costs and disbursements incurred by reason of the removal proceedings, should it be determined that the case was not removable or was improperly removed, then this obligation to be void, otherwise of full force and effect.

In Witness Whereof, The parties hereto have caused these presents to be properly executed on this 10th day of July, 1954.

SOUTH WESTERN RAILROAD COMPANY,
By H. D. RUSSELL,
Its Attorney at Law.
CENTRAL OF GEORGIA RAILWAY COMPANY,
By H. D. RUSSELL,
Its Attorney at Law,
(Principals).
HORACE W. WATERS,
(Horace W. Waters),
(Surety).

The above and foregoing bond approved, this 10 day of July, 1954.

LUCILLE H. ROBINSON,
Dep. Clerk, United States District Court for the Middle District of Georgia.

Filed July 10, 1954.

MOTION TO REMAND.

(Title Omitted.)

To the Honorable the District Court of the United States for the Middle District of Georgia, and the Honorables T. Hoyt Davis and William A. Bootle, Judges thereof:

The plaintiffs in the case stated respectfully show to the Court:

1.

This action was instituted by them in the Superior Court of Bibb County, Georgia by a complaint or petition filed therein on the 18th day of June, 1954.

2.

The said petition or complaint was served on the defendants on June 21, 1954.

3.

The defendants on July 10, 1954 filed and served a petition for the removal of the case to this Honorable Court.

4.

The plaintiffs, as movants, respectfully show to the Court:

(a) The case was thus removed improvidently and without jurisdiction;

(b) The complaint does not state a case cognizable in the Federal Courts;

(c) The petition or complaint is not a civil action in which it was sought to enjoin, set aside, annul or suspend in whole or in part an order of the Interstate Commerce Commission;

(d) The petition or complaint, while a civil action, is not one of which the District Courts of the United States have original jurisdiction and is not founded on a claim or right arising under the Constitution, treaties or laws of the United States;

(e) The plaintiffs in their petition in the State Court did not undertake to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission;

(f) The cause of action stated in the original petition is not one arising under the Federal laws;

(g) The cause of action stated in the original petition is not one arising under the Constitution, laws or treaties of the United States.

Wherefore, pursuant to their right so to do conferred by Section 1447 of Title 28 of the United States Code, the plaintiffs move this Court to remand this cause to the Superior Court of Bibb County, Georgia,

from which it was removed improvidently and without jurisdiction.

CHARLES J. BLOCH,
DENMARK GROOVER, JR.,
Attorneys for Movants.

BLOCH, HALL, GROOVER & HAWKINS,
Of Counsel.

I certify that I have mailed a copy of the within and foregoing motion to remand to:

Messrs. Lawton and Cunningham
Savannah, Georgia;

Messrs. Harris, Russell, Weaver & Watkins
Macon, Georgia

This July 14, 1954.

CHARLES J. BLOCH.

Filed July 15, 1954.

(Title Omitted.)

Bootle, District Judge:

This case came on to be heard upon motion to remand and was duly heard both upon oral argument and by briefs.

This case presents a new chapter in a long story of litigation between certain stockholders of the South Western Railroad Company on the one hand and the

Central of Georgia Railway Company on the other. The previous chapters in that story are very interesting and appear, chronologically as follows: Benton v. Callaway, 165 F. (2) 877, 5 Cir., January 13, 1948; Merrel P. Callaway, Trustee, et al., v. L. O. Benton, Jr., et al., 336 U.S. 132, 93 L. Ed. 553, February 7, 1949; South Western Railroad Company v. Benton, 206 Ga. 770, 58 S.E. (2) 905, April 10, 1950, Certiorari to United States Supreme Court denied October 9, 1950, 340 U.S. 815, 95 L. Ed. 599; Benton et al., v. United States et al., 114 F. Supp. 37, D. C. Middle D. of Ga., August 24, 1953.

In the case last cited, Judge Conger, writing for a three-Judge Court, gave a brief resume of the highlights of the history of the South Western Railroad Company, and its long and intimate relation to the Central of Georgia Railway, and the Courthouse battles and the long and arduous litigation, of which the present case ought to be a climax . . . " As Judge Conger stated, that history is "significant and intriguingly interesting."

In considering this motion to remand, however, this Court can consider only such portions of that long and interesting history as appear in the petition filed in the State Court. The allegations of the petition must be examined against the background of Title 28, Section 1331 of the United States Code to see whether the petition states a cause of action which "arises under the Constitution (or) laws . . . of the United States" and against the background of Section 1336 to see whether the petition states a cause of "action to enforce, enjoin, set aside, annul or sus-

pend, in whole or in part, any order of the Interstate Commerce Commission."

In construing the petition, we must, of course, consider all documents and exhibits annexed thereto and forming part thereof the same as the formal allegations of the petition. State of Louisiana v. Morgan's Louisiana & T. R. & S. S. Co., 18 F. (2) 645 (D. C., W. D. La.)

The petition was filed in the Superior Court, Bibb County, Georgia, by W. H. B. Simpson, Lucy C. B. Simpson, Mary Elizabeth Simpson, T. H. Bowden, Ansel M. Smith, Belk-Simpson Company of Abbeville, South Carolina, Inc., Belk's Department Store of Clinton, South Carolina, Inc. The Greenville Bargain House, a corporation of the State of South Carolina against the South Western Railroad Company, hereinafter called the South Western, and the Central of Georgia Railway Company, hereinafter called the Central. The petition is, in length, consistent with the long litigation which has gone before. It comprises thirty-one pages and is documented with nineteen pages of exhibits. It traces all of the former litigation and negotiations concurrent with that litigation and subsequent thereto.

The petition makes the following case:

The capital stock of the South Western is $5,191,-100.00, all common with par value of $100 per share. Petitioners own 664 shares (a little more than 1 per cent). The Central owns or claims to own 50,368 shares.

The South Western comprises some 340 miles of railroads, bridges, depots, and appurtenances in the heart of the system of the Central.

On December 19, 1932, the properties of the South Western were being operated by the Central under a long-term lease at a rental authorizing South Western to pay its stockholders an annual dividend of 5 per cent. On that date the District Court for the Southern District of Georgia appointed a receiver for the assets of the Central. The receiver adopted the lease of South Western and continued operation of both railroads.

On June 19, 1940, the Central filed its petition under Section 77 of the Bankruptcy Act, and trustees in bankruptcy were appointed. The trustees by contract with South Western adopted the lease on a modified basis, agreeing to pay in lieu of rental the net income of the leased property, and to guarantee South Western against losses and expenditures for additions and betterments in excess of $50,000 per annum. The net income of the leased properties for the period June 19, 1940, to July 1, 1943, was determined by a segregation formula, or bankruptcy formula, promulgated by the Interstate Commerce Commission (252 I.C.C. 587) and approved by the District Court on August 19, 1943.

The contract between the trustees of the Central and the South Western was terminated July 1, 1943, and thereafter the trustees of Central adopted the South Western lease for the duration of the bankruptcy.

A plan of reorganization of the Central was promulgated by the Interstate Commerce Commission and was approved by the Bankruptcy Court June 24, 1946. That plan allotted to South Western $2,200,000 of the first mortgage 4 per cent series A bonds and $1,770,000 of 4-1/2 per cent income bonds series B of the reorganized company in exchange for all of the said leased properties.

The South Western stockholders in March, 1944, 1945, and 1946 rejected the plan as grossly unfair and inadequate.

On February 11, 1947, the Interstate Commerce Commission submitted the plan to creditors and leased lines for acceptance or rejection on or before midnight, March 28, 1947.

On March 13, 1947, the directors of South Western resolved that the plan be accepted subject to the assent by the holders of a majority of the South Western stock.

On March 25, 1947, L. O. Benton, Jr. and Charles J. Haden as stockholders of South Western filed in Bibb Superior Court their petition to enjoin the officers and directors of South Western from holding a stockholders' meeting on March 28, 1947, to consider said plan and, in the event such meeting should be held and a mere majority of the stockholders should approve the plan, to enjoin the directors from consummating it.

The Superior Court did not enjoin the meeting, and the stockholders on March 28, 1947, approved the plan by a vote of 30,137 shares to 9057 shares.

The Judge of the Superior Court held hearings on March 26 and 27, 1947, and deferred his ruling upon request and agreement of counsel. On April 18, 1947, M. P. Callaway, Trustee of the Central, filed in the Bankruptcy Court a petition against L. O. Benton, Jr., Charles J. Haden, and the South Western, praying that Benton and Haden be enjoined from further prosecuting their petition in the Superior Court, and on said date the District Court granted a preliminary injunction as prayed.

On April 24, 1947, the Judge of the Superior Court of Bibb County, Georgia, of his own motion issued an interlocutory injunction against the defendants in the State Court, basing his ruling on the ground that South Western had no charter power to sell its railroad without unanimous consent of the stockholders.

On August 15, 1947, the District Court made its injunction permanent and also annulled the interlocutory injunction granted by Bibb Superior Court on April 24, 1947. This action of the District Court was reversed by the United States Court of Appeals for the Fifth Circuit on January 13, 1948, Benton v. Callaway, 165 F. (2) 877. This decision was upheld by the Supreme Court of the United States, Merrel P. Callaway, Trustee, et al., v. L. O. Benton, Jr., et al., 326 U.S. 132, 93 L. Ed. 553.

Then the litigation in Bibb Superior Court proceeded to a permanent injunction on December 5, 1949, which was upheld by the Supreme Court of Georgia on April 10, 1950, in the case of South Western Railroad Company et al., v. Benton et al., 206 Ga. 770, and certiorari was denied by the Supreme Court of

the United States on October 9, 1950, 340 U.S. 815, 95 L. Ed. 599.

In the meantime, South Western's properties had continued to be operated by Central from December 19, 1932 to June 19, 1940, under the lease adopted by the receiver, from June 19, 1940 to July 1, 1943, under the segregation formula by the trustee, and from July 1, 1943 to July 1, 1948, under the lease by the trustee.

On March 5, 1948, the Bankruptcy Court had passed an order rejecting the lease of the South Western as of the consummation date of the plan, which was July 1, 1948, and provided that:

"From and after the consummation date the reorganized company shall operate the lines of the South Western for the account of the South Western, subject to the jurisdiction of this Court; provided that, if the properties of the South Western be acquired on the terms set forth in the plan subsequent to the consummation date and within a reasonable time after the termination of the litigation now pending, the effect of such acquisition shall be the same as if such properties had been acquired on such terms on the consummation date, and the result of operation by the reorganized company of South Western's railroads for the account of South Western, whether profit or loss, shall not affect the amount of bonds distributable under the plan to South Western Railroad Company, or the interest payable thereon from the consummation date."

The order of Judge Scarlett of March 5, 1948, did not prescribe any formula for determining the results

of the operation. The properties had been operated under the segregation, or bankruptcy, formula from June 19, 1940 to July 1, 1943, and under the lease from July 1, 1943 to July 1, 1948.

Since the rejection of the lease by the District Court on March 5, 1948, as of July 1, 1948, there has been no agreement between the two railroad companies as to a formula under which the operation should proceed.

On October 24, 1950, a special meeting of the Board of Directors of South Western gave consideration to the status of South Western resulting from the litigation to that date and to what they would consider a proper formula to be applied to the operation subsequent to July 1, 1948, and authorized its President to employ William Wyer and Company to assist South Western in the preparation of such a formula. At that meeting, Mr. B. J. Tarbutton resigned as a director of South Western. Prior to October 24, 1950, the Vice President and General Counsel of South Western had written to the officers of Central stating that South Western was not conceding that the formula applied was the proper formula to be applied, nor that the formula had been correctly applied. These letters were written on December 18, 1949, March 10, 1950, and July 21, 1950.

At a meting of the Board of Directors of South Western on December 21, 1949, the Vice President had been instructed to notify the Central that the report showing the results of operations of South Western by Central from July 1, 1948 to April 30, 1949 was neither acceptable so far as the formula

was concerned nor as to the application of the formula, and that the Central's report was received as information only. Director Benton moved the adoption of the resolution and his motion was seconded by Director Tarbutton, who on October 24, 1950, had resigned as a director of South Western and was in January 1951 elected President of the Central.

Again on March 9, 1950, the directors of South Western directed its counsel to write a similar letter to Central regarding its statement of operations up to June 30, 1949, and to state that South Western did not concede that the formula applied was the proper formula to be applied, nor the correctness of the application.

The President of South Western notified its stockholders of the directors' action of October 24, 1950, and promised future notification as to any developments of importance which might result from the appointment of a negotiating committee on said date to negotiate with Central for sale or lease of South Western's properties, and to negotiate with other railroad companies looking toward the acquisition by such companies of South Western's properties.

On November 1, 1950, South Western's President called upon the General Counsel of Central and to his surprise learned from said General Counsel that it was not the intention of the Central to write a new formula, but that it was its intention to employ the formula used from June 19, 1940 to July 1, 1943, and that the question would be raised by the Central's billing South Western for the amount claimed to be due thereunder.

On December 5, 1950, a conference was held between the said negotiating committee and officials and counsel of the Central and further negotiations were subsequently held; but on January 16, 1951, the Central without any notice to the negotiating committee sent out directly to South Western's stockholders a letter proposal to purchase a majority of South Western's stock under the terms of a depositary agreement dated January 1, 1951, and subject to the approval of the Interstate Commerce Commission. No one of the petitioners deposited his or her stock or has agreed to sell it.

In the meantime, Congress by adoption of Section 441 (j) of the Internal Revenue Code enhanced South Western's potential ability to pay a dividend.

On March 8, 1951, the annual meeting of South Western's stockholders was dominated by the Central through proxies obtained for that purpose. Director J. B. Ilges, Jr., of South Western had sold his stock and being no longer eligible resigned as a director. Director L. O. Benton, Jr., was displaced at said meeting.

At said stockholders' meeting of March 8, 1951, a resolution was introduced, the preamble of which recited that the Central contended that it was operating South Western's properties under the bankruptcy formula and that, therefore, a grave dispute and difference existed between the South Western and the present management of the Central, and that South Western's officers had correctly taken the opposite view to that of Central's officers. The resolving clause directed South Western's officers immediately to take

such legal action as might be necessary to have this question judicially determined. When this resolution was offered, however, one of South Western's directors suggested that it might transpire that when Mr. William Wyer made his report to the directors, it would be inadvisable to take any legal action with respect to the formula, and the resolution was amended by adding thereto: "When and if the officers are advised by William Wyer . . . that, in his opinion, the so-called bankruptcy formula is not a formula which should be applied to operations since July 1, 1948."

About the middle of May, 1951, Mr. Wyer told the Vice President and Counsel of South Western that he did not consider the formula fair and that if he were asked he would give his reasons therefor.

No legal action was ever taken to determine the question of the applicability and fairness of the said formula, although petitioners and some other former stockholders of South Western steadfastly insisted upon such action.

On February 23, 1953, the directors of South Western transmitted to its stockholders a report that they were of the opinion South Western's welfare demanded a judicial determination of all controversies between the two railroads growing out of Central's operation of South Western for the past four years and eight months, and in which it was stated that the directors had authorized South Western's counsel to do whatever he deemed necessary to protect the interests of the stockholders. Nothing was done by said counsel.

On January 22, 1951, the Central applied for authority under Section 5 (2) of the Interstate Commerce Commission Act as amended to acquire control of South Western through a purchase of a majority of its capital stock.

On January 23, 1951, L. O. Benton, Jr., and Wallace Miller, who constituted the negotiating committee above mentioned, wrote a letter to South Western's stockholders stating, among other things, that the Central in its letter of January 16, 1951, to said stockholders offering to buy their stock for $75 per share had gone over the head of said committee and that, in said committee's opinion, said stock was worth more than $75 per share, pointing out that under the original plan of reorganization, taking into consideration the then market for Central's bonds, the value of a share of South Western stock under that original offer would be $87.05.

Certain stockholders of South Western intervened in objection to the grant of the application of January 22, 1951 to the Commission and undertook to have the Commission require South Western to furnish information as to the value of its stock. South Western refused to arrange to furnish the information and the Commission refused to compel it to do so. On March 2, 1953, the Commission promulgated an order authorizing the Central to acquire control of South Western through ownership of a majority of its capital stock.

On March 20, 1953, pursuant to Title 28, U.S.C. Sections 1336, 2321 et sequentia, and Title 49, U.S.C. Section 17 (9), certain stockholders of South Western,

including some of petitioners, filed in this Court their action to enjoin, set aside, annul and suspend the aforesaid order of the Commission. On August 24, 1953, a three-Judge Court filed its opinion and order in said case denying the prayers of the petition and dismissing the complaint. Benton et al., v. United States et al., 114 F. Supp. 37.

Subsequently and by February 25, 1954, Central acquired by purchase at $75 per share approximately 97 per cent of South Western stock.

On February 25, 1954, Mr. Wallace Miller, then President of South Western, submitted to its stockholders a report of the affairs of the company showing that Central was claiming against South Western:

Deficit in operation through July 31, 1953 ..	$ 557,001.72
Additions and betterments through December 31, 1953	514,419.68
Refund of taxes obtained by South Western for years 1947 and 1948	168,000.00
Total	$1,239,421.40

Said report restated South Western's contention that the bankruptcy formula was not a proper or reasonable formula to be applied to the operations since July 1, 1948 to determine South Western's net income or loss from operations and that a judicial determination of all differences should be had to the end that the reasonable and fair rental value of Central's use and enjoyment of South Western's railroad since July 1, 1948 might be ascertained.

On March 11, 1954, at the annual meeting of South Western's stockholders, all its directors and its counsel were removed and replaced by Central's officers and counsel. At said meeting, seven individuals were elected to comprise the Board of Directors of South Western, each of whom was an officer, director, agent, or employee of the Central.

At said meeting, a resolution was adopted authorizing the execution of a contract for the operation of South Western's properties by the Central.[1]

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[1] "Whereas:

"1. This Company owns a railroad and has been given by the State of Georgia a franchise to operate it.

"2. The Interstate Commerce Commission has found that it is in the public interest that said railroad be operated as a part of the system of Central of Georgia Railway Company, at the heart of which it lies.

"3. The Supreme Court of Georgia has held that this Company may not sell its railroad and franchises to Central of Georgia Railway Company or to any other corporation except on the unanimous approval of this Company's stockholders, which it is obviously impossible to secure.

"4. The operation of this Company's railroad by Central of Georgia Railway Company for the account of this Company has resulted over a period of approximately five and a half years, in annual operating deficits and large claims

Thereafter there was executed by the South West-

against this Company for Additions and Betterments put on this Company's railroad, so that this Company and its stockholders have received no income from the operation of its properties but have, on the contrary, incurred a large debt.

"5. This Company desires to accomplish the continued operation of its property in the public interest and in the fulfillment of its obligations to the State of Georgia and at the same time realize a reasonable revenue therefrom.

"6. This Company knows of no way to accomplish these things except by making an agreement with Central of Georgia Railway Company for the operation of this Company's property under terms and conditions which are satisfactory to both parties.

"7. Such an agreement cannot take effect until it has been approved by the Interstate Commerce Commission.

"8. An operating agreement which has the approval of the Central of Georgia Railway Company has been submitted to this Company for approval.

"It is, therefore

"Resolved, that the proper officers of this Company are authorized and directed to execute an operating agreement with Central of Georgia Rail-

ern and the Central an "operating agreement."[2]

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way Company in substantially the form submitted to this Company, a copy thereof being attached to and made a part of the minutes of this meeting; provided that said agreement shall not take effect until it has been approved by the Interstate Commerce Commission and by any administrative, or any judicial, body, having jurisdiction in the premises and shall, upon said approval, take effect as of midnight on December 31, 1953, and provided further that said agreement shall reserve to this Company the right of cancellation in the event that this Company should determine that it is financially able to operate its property and desires to do so."

[2] The Interstate Commerce Commission in its report approving said operating agreement, summarized its terms as follows: " . . . an agreement has been entered into between the applicant and the South Western providing that as of midnight December 31, 1953, subject to our approval, the applicant is appointed agent of the South Western to operate all of the latter's tangible real and personal property (except its cash, stocks, bonds, debentures, and other investment securities) which are, or may be used or useful, in connection with the operation of its railroad as a common carrier, together with the appurtenances thereto.

"Without affecting the generality of the property description, the agreement recites that included therein are all of South Western's tracks and the rights-of-way therefor, its real property

Thereafter, on May 13, 1954, petitioners sent to South Western and to its president a letter pursuant to the provisions of Section 22-711 of the Code of Georgia of 1933 requesting that said contract not be

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and the improvements thereon, its buildings on land which the South Western does not own, its terminal facilities and its depots, warehouses, and yards. The South Western also assigns to the applicant all of its right, title, and interest in all properties and facilities used singly or jointly by the South Western in its common carrier operations under agreements with other railroads, and also all of its right, title, and interest in any and all agreements, leases, and easements, which pertain to any of the South Western's property which is to be operated by the applicant.

"All the income from the operation of the South Western's properties is to be received by the applicant, and it will pay the former what amounts to a dividend of $3 a share on the portion of its stock other than that registered in the name of the applicant or affiliates, and such sums the South Western is to pay in dividends to the minority stockholders. The applicant waives dividends on the stock held by it. The proposed payment for dividends are predicated on a return of 4 per cent on $75 a share, the fair value of the stock as found by us in South Western R. Co. Control, supra. The applicant also is to pay the expenses incident to maintaining the South Western's corporate existence; all its taxes, except those chargeable to investment account, and except intangible taxes on its cash and investment securi-

executed, if not already executed, because it is in reality a lease, not within the charter powers of the South Western and violative of its charter, because it is a transaction between the South Western and its

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ties, and income taxes on the income derived from such sources; all sums payable under existing agreements relating to the exclusive and joint use of any railroad facilities or appurtenances; and a sum equal to all charges and deductions allowed the South Western under the Internal Revenue Laws for amortization and depreciation of its property, and any other deductions allowed under such laws in the event of retirement or abandonment of its property on account of casualty, obsolescence or other causes not provided for through depreciation or amortization, less a sum equal to $3.00 multiplied by the number of shares of South Western stock which is held of record by stockholders other than the applicant or its affiliates. The effect of the contract is that the payment for depreciation and amortization plus the payment for dividend purposes will always equal the sum of all charges or deductions allowed the South Western under the Internal Revenue laws for amortization and depreciation.

"Furthermore, the applicant is to pay all costs of maintenance and operation, keeping the property in as good order and repair as it was on the effective date of the agreement, ordinary wear and tear excepted, and will return the property to the South Western at the termination of the agreement, replacing such property as may have been consumed with use with property of equal value. The South Western is to reimburse the applicant for the cost of additions and better-

majority stockholders which would be destructive of the company, because a majority of the stockholders are acting in their own interests in a manner destructive of the company, and because the majority stockholders were oppressively and illegally pursuing in the name of the corporation a course in violation of the rights of other stockholders; requesting also that, if executed, said contract be canceled; asserting that the election of Mr. B. J. Tarbutton as President of South Western was illegal and contrary to the interests of South Western's minority stockholders because he was President of the Central and that his service would be an action of the majority stockholders in its own interest destructive of the company or of the rights of minority stockholders; requesting action compelling his resignation; requesting action compelling the resignation of the newly elected Board of Directors of South Western; request-

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ments to the former's property, or the applicant may offset against their cost what it owes the South Western for depreciation, amortization, etc. The South Western will be indemnified by the applicant for any acts or omissions of the latter in operating the property. The agreement is to continue in effect for 1 year from midnight December 31, 1953, unless sooner terminated by South Western for failure to make rental payments, and from year to year thereafter. The South Western also may terminate the agreement at midnight of any December 31, on the ground that it is financially able to operate the property by giving 3 months' written notice thereof. Likewise, the applicant may terminate the agreement as of any such date upon 3 months' written notice."

ing a judicial determination of all differences between the two railroads and insisting that the "double rent" statute of Georgia is applicable; and demanding that legal action be taken to determine whether the Central was correct in its contention that it was operating South Western's properties under the bankruptcy formula or the South Western correct in its opposite contention.

On or about May 13, 1954, petitioners received a reply signed by B. J. Tarbutton, President, advising that since the contract had been executed by direction of the stockholders it could not be canceled except by direction of the stockholders and that he did not expect to call a stockholders meeting for that purpose; that the Interstate Commerce Commission had authorized him to serve as President of both companies and he did not expect to resign; that the directors of South Western had also been authorized to serve and did not intend to resign; that since July 1, 1948, Central had been operating South Western's properties under order of the United States District Court for the Southern District of Georgia for account of the South Western Railroad Company and that no question of the rental value of these properties was involved; that the present management of South Western did not feel that the grounds on which South Western had earlier refused the Central's demand for payment for additions and betterments placed on South Western's properties were sound; that the South Western's stockholders resolution authorizing legal action against the Central had been passed on March 8, 1951, and that by the time Central's purchase of the majority of South Western's stock had been approved by the Commission, three years had elapsed

without any such action being taken, and the present management did not feel called upon to take that action.

On April 8, 1954, the District Court of the United States for the Southern District of Georgia entered an order rescinding a portion of its order of March 5, 1948, and providing in substance that when and if the Interstate Commerce Commission approved the application of the Central then pending in Finance Docket No. 18465 (application for authority to enter into the operating agreement) from the effective date of its order of approval, the Central would be relieved of the duty of operating the lines of South Western for the account of that company and subject to the jurisdiction of said Court.[3]

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[3] "1. When and if the Interstate Commerce Commission approves the application of Central of Georgia Railway Company now pending before it in Finance Docket No. 18465, and on the effective date of its order of approval, the following portion of this Court's order of March 5, 1948 (Document No. 552) will be rescinded as of midnight on December 31, 1953:

" 'From and after the consummation date, the Reorganized Company shall operate the lines of the South Western for account of the South Western subject to the jurisdiction of this Court.'

"Central of Georgia Railway Company shall be relieved as of that date and without any further order of this Court of the duty of operating the lines of South Western Railroad Company for the account of that Company and subject to the jurisdiction of this Court.

Thus ends the petition's allegations of fact. The remaining allegations set forth petitioners' reasons for feeling aggrieved. It is alleged, for instance, that the resolution of South Western's stockholders of March 11, 1954, authorizing the execution of the operating agreement was beyond the powers of the corporation and its stockholders and is void; that under the laws of Georgia a railroad corporation cannot without special authority of statute alienate its franchise or property whether by sale, mortgage, or lease; that said contract is ultra vires and void; that the execution of the contract and operations under it constitute such a transaction as will result in serious injury to South Western and its stockholders other than Central; that Central in procuring said contract and in operating under it is oppressively and illegally pursuing in the name of South Western a course in violation of the rights of the stockholders

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"2. When and if the Interstate Commerce Commission approves the aforesaid application of Central of Georgia Railway Company in Finance Docket No. 18465, and on the effective date of that order, Merrel P. Callaway shall be discharged as Trustee of the property of Central of Georgia Railway Company in these proceedings for the reorganization of that Company, and shall stand fully relieved of all liability as Trustee or individually for any acts or omissions of his performed or omitted in his capacity as Trustee, since the termination at 12:01 A.M. July 1, 1948, of the period in which he operated the properties and business of Central of Georgia Railway Company, as Trustee, pursuant to the authority of this Court."

which can only be restrained by a Court of equity; that petitioners have acted promptly and have made an earnest effort to obtain redress at the hands of the officers, directors, and stockholders of South Western; that until a judicial determination of all differences between Central and South Western is had, the continued operation under the contract should be restrained and enjoined by the Court; that until such determination, Central should be restrained and enjoined from disposing of any assets of South Western, and South Western restrained and enjoined from permitting, acquiescing in, or joining in such disposal; that petitioners are advised that bonds, notes and certificates of indebtedness of the value of $1,214,549.37 and cash in the amount of approximately $35,000.00 were on or about March 12, 1954 delivered by the retiring treasurer of South Western to the officers and directors elected at the meeting of March 11, 1954; and that if any of said securities or cash have been delivered to Central in satisfaction of any alleged indebtedness due it by South Western, Central should be required to restore such amount to South Western pending a final determination of all such differences.

The prayers of the petition are that it be decreed that the "operating agreement" is ultra vires, null and void, and that the properties of South Western may not be operated by Central under its terms; that it be decreed that said agreement and operation under it will result in serious injury to South Western, petitioners and other stockholders similarly situated; that said agreement be canceled; that it be decreed that said agreement and operation under it constitute a course oppressively and illegally pursued in the name of South Western by the majority stockholder, the Central, which course is in violation of the rights

of petitioners and other stockholders similarly situated; that until a judicial determination of all differences between South Western and Central, arising out of Central's operation of South Western's properties, has been had to the end that the reasonable and fair rental value of Central's use and enjoyment of South Western's railroads since July 1, 1948, and in the future until further order of this Court, has been ascertained, that the operation by Central of South Western's properties under the operating agreement be restrained and enjoined; that until such judicial determination Central and South Western be restrained and enjoined from disposing of or changing the status of any assets of South Western; that South Western render an accounting as to whether or not any of said securities or cash have been expended, and if so for what purpose; that if any portion of such securities or cash have been delivered to Central in satisfaction of any alleged indebtedness alleged to be due it by South Western, or otherwise, Central be required to restore such to South Western pending a final determination of all differences between South Western and Central; and for such other and further relief as to the Court may seem meet and proper.

South Western and the Central removed this case into this Court upon their petition alleging first that the controversy arises under the laws of the United States and the sum or value in controversy exceeds the sum of $3000.00 exclusive of interest and costs and is cognizable in the Federal Courts, and secondly that said suit is a civil action in which it is sought to enjoin, set aside, annul or suspend in whole or in part an order of the Interstate Commerce Commis-

sion. Both of these allegations and contentions as to the jurisdiction of this Court are vigorously challenged in the petitioners' motion to remand.

Our first inquiry is: Do we have here an action which "arises under the Constitution, laws or treaties of the United States?" 28 U.S.C. Section 1331.

The leading case upon this question is Gully v. First National Bank, 299 U.S. 109, 81 L. Ed. 70. The Supreme Court there said "To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. . . A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto . . . and the controversy must be disclosed upon the face of the complaint, unassisted by the answer or by the petition for removal. . . Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense."

In Gully v. First National Bank, supra, the Supreme Court also quoted with approval from their decision in Shulthis v. McDougal, 225 U.S. 561, 569. 56 L. Ed. 1205, 1210, as follows: "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so

arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends," and continued: "Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit. The tax here in controversy, if valid as a tax at all, was imposed under the authority of a statute of Mississippi. The federal law did not attempt to impose it or to confer upon the tax collector authority to sue for it. True, the tax, though assessed through the action of the state, must be consistent with the federal statute consenting, subject to restrictions, that such assessments may be made . . . By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby . . . With no greater reason can it be said to arise thereunder because permitted thereby . . . The most one can say is that a question of federal law is lurking in the background, just as farther in the background there lurks a question of constitutional law, the question of state power in our federal form of government. A dispute so doubtful and conjectural, so far removed from plain necessity, is unavailing to extinguish the jurisdiction of the states."

Two recent district Court opinions bring the principles of the Gully v. First National Bank case down to date. In Allen v. Southern Railway Company, 114 F. Supp. 72, D. C. Western District, N. C. 1953, non-union employees of the Southern Railway Company brought suit in the State Court to enjoin enforcement against them of a union shop contract made between that company and a number of labor unions, which

required that employees join the union and pay dues or be dismissed from their positions. The plaintiffs made no mention of any federal statute or of any rights arising out of the Constitution or laws of the United States but asked relief under the laws of North Carolina. The Railway Company in its answer admitted the existence of the union shop contract and pleaded the 1951 amendment to the Railway Labor Act, 45 U.S.C.A. Section 152 (11) as justification for making same, averring that it entered into the contract unwillingly and because of a threat of a strike of the unions. The unions, on the ground that the case was one arising under the Constitution and laws of the United States, filed a petition for removal to the District Court of the United States. The hearing was upon the petition to remand. The three-Judge Court through Circuit Judge Parker held that the case had been improperly removed and that the complaint did not set forth a cause of action arising under the Constitution or laws of the United States. Judge Parker wrote as follows:

The amendment to the Railway Labor Act of which we take judicial notice must unquestionably be considered in passing upon the case; but the complaint states no cause of action arising under that statute the effect of which is to destroy any cause of action which plaintiff might otherwise have had under state law. In a very similar case where plaintiffs were asking injunctive relief under state law which conflicted with federal laws regulating interstate commerce and the argument was made that the case was removable because it was necessary that federal laws be considered in its decision, the Supreme Court held that the case should have been remanded on

the ground that plaintiffs' cause of action did not arise under the federal laws. State of Arkansas v. Kansas & Texas Coal Co., 183 U.S. 185, 190, 22 S.Ct. 47, 49, 46 L. Ed. 144. The Court said:

" 'But even assuming that the bill showed upon its face that the relief sought would be inconsistent with the power to regulate commerce or with regulations established by Congress, or with the 14th Amendment, as contended, it would only demonstrate that the bill could not be maintained at all, and not that the cause of action arose under the Constitution or laws of the United States.'

" . . . So long as plaintiff's cause of action does not arise under the laws of the United States, the case is not removable, even though when these laws are considered plaintiff has no cause of action and is not entitled to an injunction. The defendant in such case must rely for protection of his rights upon action by the State Courts, which are just as much bound as are the federal Courts to give effect to the laws of the United States, and in a case involving those laws are subject to review by the Supreme Court of the United States."

The facts in the case of Sandaberry v. Gulf, C. & S. F. Ry. Co., 114 F. Supp. 834, District Court, N. D. Texas 1953, are essentially the same as in Allen v. Southern Railway Company, supra, except that in the Sandaberry case the plaintiffs brought suit before the union shop contract was signed to prevent its being signed and in their petition took anticipatory notice of the 1951 amendment to the Railway Labor Act "to point out at the outset the plaintiffs' counts

against the constitutional validity of said statutory amendment." In sustaining the motions to remand, Judge Dooley said:

"Justice Holmes has said tersely, 'A suit arises under the law that creates the cause of action.' American Well Works Company v. Layne & Bowler Company, 241 U.S. 257, 36 S. Ct. 585, 586, 60 L. Ed. 987. . . Of course it is easily predictable, although the removing defendants have not yet answered, that the 1951 Amendment will be confronted in the determinations made during the course of this litigation, but clearly that is not enough to predicate federal jurisdiction. Even if it were a certainty that the plaintiffs' suit must ultimately flounder on the rock of said Amendment that still would not affect the question of jurisdiction."

In the light of these authorities and the numerous cases cited therein, it is the opinion of this Court that were it not for the provisions of Title 28, Section 1336 and Section 2321 et sequentia and Title 49, Section 17 (9) of the United States Code, the petition would not state a cause of action which arises under the Constitution or laws of the United States, but how stands petitioners' case in view of said provisions and particularly in view of the second inquiry: Is this an "action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission"?

It is abundantly clear that the operating agreement which petitioners seek to cancel was not to take effect, could not take effect, and did not take effect until it was specifically approved by the Interstate

Commerce Commission. This is apparent from the revolving clause of the stockholders' resolution of March 11, 1954 and from paragraph 10 of the agreement itself. Moreover, it was stated in oral argument, and not denied, that the Commission had on May 14, 1954, specifically approved the operating agreement. Furthermore, the defensive pleadings filed in this Court on behalf of the two railway companies allege that the operating agreement has been authorized by and approved by the Interstate Commerce Commission under Section 5 of the Interstate Commerce Act, by Interstate Commerce Commission order dated May 14, 1954, Finance Docket No. 18465, in re South Western Railroad operation. As an exhibit to said pleadings, there appears a copy of the report and order of the Commission. The report concludes with the following paragraph:

"Subject to the conditions for the protection of railroad employees referred to, we find that the operation under contract by the Central of Georgia Railway Company of all the properties of the South Western Railroad Company, as described herein, is a transaction within the scope of section 5(2) of the Interstate Commerce Act, as amended, that the terms and conditions are just and reasonable, and that the transaction will be consistent with the public interest. An appropriate order will be entered."

The order of the Commission is as follows:

"Investigation of the matters and things involved in this proceeding having been made, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions

thereon, which report is hereby referred to and made a part hereof:

"It is ordered, That, subject to the conditions for the protection of railroad employees referred to in said report, the operation, under contract by the Central of Georgia Railway Company of all of the properties of the South Western Railroad Company, as described in the report aforesaid, upon the terms and conditions in said report found just and reasonable, be, and it is hereby, approved and authorized."

Petitioners' briefs filed in this Court do not question the defendants' allegations that such approval has been obtained.

The allegations of the petition, construed as they must be with the exhibits attached thereto, convince this Court that petitioners' action is essentially one to enjoin, set aside, annul and suspend the said order of the Interstate Commerce Commission. Such is the effect of the controlling decisions.

Section 5 (2) of the Interstate Commerce Act, as amended, 49 U.S.C. 5 (2), under which the Central on March 15, 1954, applied to the Commission for approval of the operating agreement provides in part as follows:

"It shall be lawful, with the approval and authorization of the Commission . . . for any carrier or two or more carriers jointly . . . to . . . contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise . . ."

Section 5(11) provides in part as follows:

"The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power . . . to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, in so far as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State."

The report of the Commission in passing upon said application stated in part as follows: "The proposal (operating agreement) is the only feasible method whereby the properties of the South Western may be

operated as a part of the applicant's system which we have heretofore found would be in the public interest." (Exhibit II to answer of South Western and Central.) Pursuant to said report, the Commission entered the above mentioned order approving and authorizing the operation under the operating agreement.

In the case of Lambert Run Coal Co. v. Baltimore & Ohio R. Co. 258 U.S. 377, 66 L. Ed. 671, it was established that a petition may be one to set aside an order of the Interstate Commerce Commission without proclaiming such purpose upon its face. There the plaintiff, Lambert Run Coal Company, sued the Baltimore & Ohio R. Co. in the State Court to restrain it from observing its rules in regard to the distribution of coal cars in a time of car shortage. The complaint did not disclose, but rather concealed, the fact that the defendant's rules were the same rules which had been promulgated by the Commission. The Supreme Court said:

"The fact that this was a suit to set aside an order of the Commission did not appear on the face of the bill; but it became apparent as soon as the motion to dismiss was filed. Jurisdiction cannot be effectively acquired by concealing for a time the facts which conclusively establish that it does not exist. As the State Court was without jurisdiction over either the subject matter or the United States, the District Court could not acquire jurisdiction over them by the removal. The jurisdiction of the Federal Court on removal is, in a limited sense, a derivative jurisdiction. If the State Court lacks jurisdiction of the subject matter or of the parties, the Federal

Court acquires none, although it might in a like suit, originally brought there, have had jurisdiction. . . And the vital interest of the United States was one which the plaintiff could neither ignore nor prejudice by indirection . . . The District Court should therefore have dismissed the bill as soon as it became apparent that the suit was one to set aside an order of the Commission . . . And the Circuit Court of Appeals, in remanding the cause to the District Court, should have directed a dismissal for want of jurisdiction and without prejudice."

It may be that in the Lambert Run Coal Co. case the Commission's order was mandatory, whereas in the instant case it is permissive only. But it was ruled by the Supreme Court in the later case of Venner v. Michigan Central Railroad Co., 271 U.S. 127, 70 L. Ed. 868, that such a distinction is inconsequential. In the Venner case, a minority stockholder of a railway company sued the company to enjoin it from carrying out an agreement with two other railway companies under which the three companies were to acquire a large number of locomotives by issuing certificates payable over fifteen years. The Commission had made an order approving the agreement and authorizing the acts contemplated therein. The petition alleged that to issue the certificates and provide for their payment in the manner proposed would be in violation of the laws of the state wherein the defendant company was incorporated unless the approval of designated state agencies were secured and that such approval had not been and was not intended to be secured. The Supreme Court said:

"We agree with the Court below that the suit is essentially one to annul or set aside the order of the Commission. While the amended bill does not expressly pray that the order be annulled or set aside, it does assail the validity of the order and pray that the defendant company be enjoined from doing what the order specifically authorizes, which is equivalent to asking that the order be adjudged invalid and set aside. Lambert Run Coal Co. v. Baltimore & O. R. Co. 258 U.S. 377, 380, 382, 66 L. Ed. 671, 674, 675, 42 Sup. Ct. Rep. 349. Such a suit must be brought against the United States as the respresentative of the public, and may be brought only in a Federal District Court . . . That the order is not mandatory, but permissive, makes no difference in this regard . . And as the State Court was without jurisdiction the Federal Court acquired none by the removal . . ."

A case very much like ours is State of Louisiana v. Morgan's Louisiana & T.R. & S.S. Co., 18 F. (2) 645, D.C. Western D. of La. 1927, decided by Judge Dawkins and cited earlier herein. That was a suit brought in the State Court by the Attorney General, on behalf of the State of Louisiana, to enjoin resident railway companies from leasing their lines to a Texas railway company upon the ground that the lessee planned not to maintain in the State of Louisiana domiciles and main offices for the leased lines as required by state law. In that case, as in ours, it appeared from the petition and its exhibits that the contracts sought to be enjoined would not be made except upon the authority of the Commission. An unimportant difference is that in the State of Louisiana case, the making of the contract was sought to be enjoined before the Commission acted upon the

pending application for its approval and authorization, while in our case the Commission had already approved and authorized the contract before the filing of the petition. Judge Dawkins said:

"The effect, therefore, of the writ was 'to enjoin . . . or suspend' an 'order of the Interstate Commerce Commission' by anticipation as effectively as if it had already been entered, for, until the requisite authority was granted, the complaint shows that no lease would be made, and hence no necessity for the injunction . . . It is argued on behalf of the complainant that, even if the leases should be authorized, the order would be permissive only, and not mandatory. Nevertheless there would exist a conflict between the order of the Commission and the writs of the State Courts involving a matter, to wit, the power of the Commission and legality of its order, the determination of which is vested in the Federal Courts, and in which the United States is a necessary party . . . The Interstate Commerce Commission alone is vested by Interstate Commerce Act . . . with the power preliminarily to authorize such leases between railroads engaged in interstate commerce. Until it has acted the Courts are without jurisdiction to determine the issues thus presented to the Commission."

The Court held, accordingly, that the case had been properly removed to the Federal Court.

Counsel for petitioners rely upon the case of State of Georgia v. Southern Railway Company, 25 F. Supp. 630, D. C. Northern D. of Ga., 1938, while counsel for defendants commend the reasoning of the Su-

preme Court of Georgia in the same case. See Southern Railway Company v. State, 188 Ga. 569. The clue to a distinction between the Southern Railway Company case as decided by the District Court and the instant case may be found in the Court's statement of the defendants' contentions: "Defendant claims that the petition, with the allegation with respect to the anticipatory defense, amounts to a cause of action arising under the Constitution and laws of the United States and that, as such, is removable to this Court." It may be that the defendant in that case did not claim, or did not sufficiently impress the Court with its claim, that the suit was in substance an action to enjoin or set aside an order of the Interstate Commerce Commission, regardless of whether or not, but for that aspect of the case, it could be said to have arisen under the laws or Constitution of the United States. At any rate, after the case was remanded to the State Court and eventually reached the Supreme Court of Georgia, said Court ruled that a demurrer raising the question of the jurisdiction of the State Court should have been sustained and significantly said: "The suit is in purpose and effect an effort to enjoin an order of the Interstate Commerce Commission . . . ," and buttressed its views by a thorough analysis of several decisions of the Supreme Court of the United States, including the Lambert Run Coal Co. case and the Venner case.

The views herein expressed are, of course, not at all in conflict with the ruling in the case of Romick v. Bekins Van & Storage Co., Inc., 5 Cir., 197 F. (2) 369, 1952, as we understand that case. There stockholders sued their corporation and two directors in the State Court to compel declaration of a dividend. Then the case was removed to the Federal Court.

The defendants then filed as plaintiffs in the Federal Court an original complaint designating as defendants therein the plaintiffs in the previous action and alleged that the plaintiffs in the second suit had acquired certain rights under an order of the Interstate Commerce Commission which authorized them to purchase stock in Bekins Van & Storage Company, Inc., defendant in the first suit, from the corporation and the stockholders thereof including plaintiffs in the first suit. It was further alleged that the plaintiffs in the first suit were interfering with and preventing said plaintiffs, defendants in the first suit, from conforming to said order by illegal and improper acts and specifically by the filing of said first suit. The Court of Appeals held that the first suit was improperly removed from the State Court and should have been remanded thereto. The decision was based upon the fact that "the complaint in the State Court disclosed no federal question" and that there was "no fraudulent attempt to evade removal by the plaintiffs in the State Court . . . " It does not appear from the Romick case that the plaintiffs' action was essentially one to enjoin, set aside, annul or suspend, in whole or in part, the order of the Commission. Apparently the Court of Appeals was not at all convinced that it was such an action. Moreover, if it were such an action, its true character did not at all appear from the petition or any exhibits attached thereto, and inasmuch as the Court of Appeals saw no fraudulent attempt to evade removal by the plaintiffs in the State Court, it necessarily followed that the case should have been remanded.

The Romick case was explained in Produce Terminal Realty Corp. v. New York, N. H. & H. R. Co., 116 F. Supp. 451, D. C. Mass., 1953, as follows:

"Neither is this case like Romick v. Bekins Van & Storage Co., 5 Cir., 197 F. (2) 369. The complaint there set forth simply an action to compel defendant corporation and its directors to declare certain dividends. Federal law was not necessarily involved until defendants asserted certain rights to stock in the corporation under an order of the Interstate Commerce Commission."

Therefore it is considered, ordered, and adjudged that the motion to remand in this case be, and the same is, denied.

The defendants' motion to dismiss and also the questions of whether any separate and independent cause of action other than the attempt to enjoin, set aside, and annul the Commission's order is stated in the petition, and of whether, if that is so, such cause of action should be retained here, were not fully argued by the parties and are not passed upon at this time.

This 11 day of January, 1955.

W. A. BOOTLE,
United States Judge.

Filed Jan. 12, 1955.

MOTION TO DISMISS FOR WANT OF JURISDICTION.

(Title Omitted.)

Now Come South Western Railroad Company and Central of Georgia Railway Company and move the Court to dismiss this petition for want of jurisdiction and respectfully show as follows:

On May 14, 1954, the Interstate Commerce Commission by order issued in Finance Docket No. 18465 in re South Western Railroad Company operation approved the agreement between these defendants (which is Exhibit "D" to this petition) under Section 5(2) of the Interstate Commerce Act, whereupon said agreement went into effect as of midnight, December 31, 1953, in accordance with its terms. This suit is in essence an action to enjoin, set aside and annul that order.

1. The Superior Court of Bibb County, Georgia, does not have jurisdiction of this suit because:

(a) All actions to enjoin, set aside or annul an order of the Interstate Commerce Commission must be brought against the United States of America. The United States of America was not made a party defendant in the Superior Court of Bibb County and could not be, since it has not consented to be sued in that Court.

(b) Suits to enjoin, suspend or set aside a final order of the Interstate Commerce Commission may be brought only in a Court of the United States.

(c) This suit prays for the cancellation of a contract (Exhibit "D" to the petition) which has been approved by an order of the Interstate Commerce Commission. Only a District Court of the United States would have jurisdiction of such an action.

2. The District Court of the United States for the Middle District of Georgia does not have jurisdiction of this suit because:

(a) Suits to enjoin, set aside or annul an order of the Interstate Commerce Commission must be brought in a District Court of the United States consisting of three Judges.

(b) The petition does not show that the Middle District of Georgia is the judicial district wherein is the residence or principal office of any of the parties who bring the suit.

JOHN B. MILLER,

John B. Miller,
26 East Bryan St.,
Savannah, Ga.

WALTER A. HARRIS,
H. D. RUSSELL,
Attorneys for Defendants.

H. D. Russell,
Persons Bldg.,
Macon, Ga.

(Title Omitted.)

Personally appeared before the undersigned attesting officer duly authorized to administer oaths, H. L. Fulton, Jr., Auditor of the South Western Railroad Company, who being first duly sworn on oath says that the facts contained in the foregoing Motion to Dismiss for Want of Jurisdiction are true and correct.

This 20th day of August, 1954.

H. L. FULTON, JR.,
(H. L. Fulton, Jr.).

Sworn to and subscribed before me this 20th day of August, 1954.

EARLYNE A. KEEBLER,
(Seal) Notary Public, Chatham Co., Georgia.

(Title Omitted.)

Georgia,
Chatham County.

Personally appeared before the undersigned attesting officer duly authorized to administer oaths, W. E. Dillard, President and General Manager of Central of Georgia Railway Company, who first being duly sworn on oath says that the facts contained in the foregoing Motion to Dismiss for Want of Jurisdiction are true and correct.

This 20th day of August, 1954.

W. E. DILLARD,
(W. E. Dillard).

Sworn to and susbcribed before me this 20th day of August, 1954.

BERNICE S. BAXTER,
(Seal) Notary Public, Chatham County, Georgia.

My Commission expires Jan. 7, 1956.

Certificate of Service.

(Title Omitted.)

I certify that I, H. D. Russell, of counsel for the Defendants, Central of Georgia Railway Company and South Western Railroad Company, have this day served a copy of the within and foregoing motion to dismiss for want of jurisdiction by mailing the same with proper postage affixed to the office address of Bloch, Hall, Groover and Hawkins, Attorneys of record for W. H. B. Simpson, et al.

This 23 day of August, 1954.

H. D. RUSSELL,
(H. D. Russell).

Filed Aug. 23, 1954.

ORDER OF DEFENDANTS' MOTION.

The motions of defendants, South Western Railroad Company and Central of Georgia Railway Company, to dismiss the petition for want of jurisdiction, having come on for hearing at 9:30 A.M., July 18, 1955; and after hearing full argument by counsel for all parties;

It Is Considered, Ordered and Decreed that the petition of W. H. B. Simpson, et al., be, and it is hereby dismissed without prejudice, with the following exceptions:

The finds and so decrees that the Central of Georgia Railway Company, one of the named defendants, is operating all of the properties of the South Western Railroad Company, the other named defendant; that such operation is under contract made and entered into by and between the said companies. That said contract has been approved by the Interstate Commerce Commission by order duly entered on the 14th day of May, 1954.

That exclusive jurisdiction of any action to enforce, enjoin, set aside, annul or suspend, in whole or in part, the said order of May 14th, 1954, is vested in the Federal Courts, and is denied to the State Courts. That the United States of America is a necessary party to any such action.

It Is So Ordered, this 26 day of July, 1955.

W. A. BOOTLE,
United States District Judge.

Filed July 26, 1955.

NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE 73(b).

In the District Court of the United States for the Middle District of Georgia, Macon Division.

W. H. B. Simpson, Lucy C. B. Simpson, Mary Elizabeth Simpson, T. H. Bowden, Ansel M. Smith, Belk-Simpson Company of Abbeville, South Carolina, Inc., Belk's Department Store of Clinton South Carolina, Inc., The Greenville Bargain House, a corporation of the State of South Carolina, Plaintiffs,

v. Civil Action No. 1156.

South Western Railroad Company, and Central of Georgia Railway Company, Defendants.

Notice is hereby given that W. H. B. Simpson, Lucy C. B. Simpson, Mary Elizabeth Simpson, T. H. Bowden, Ansel M. Smith, Belk-Simpson Company of Abbeville, South Carolina, Inc., Belk's Department Store of Clinton, South Carolina, Inc., The Greenville Bargain House, a corporation of the State of South Carolina, plaintiffs above named, hereby appeal to United States Court of Appeals for the Fifth Circuit from the order of United States District Judge W. A. Bootle, dated July 26, 1955, in which it was considered, ordered and decreed that the petition of the plaintiffs be and it was thereby dismissed without prejudice, with the exceptions stated in the order.

This August 3, 1955.

CHARLES J. BLOCH,
Attorney for Plaintiffs-Appellants.

Address:
520-4 First National Bank Building,
Macon, Georgia.

Filed Aug. 4, 1955.

APPEAL BOND.

(Title Omitted.)

Know All Men By These Presents, that W. H. B. Simpson, Lucy C. B. Simpson, Mary Elizabeth Simpson, T. H. Bowden, Ansel M. Smith, Belk-Simpson Company of Abbeville, South Carolina, Inc., Belk's Department Store of Clinton, South Carolina, Inc., The Greenville Bargain House, a corporation of the State of South Carolina, as principals, and H. B. Mathews, as surety, are held and firmly bound unto the United States of America in the just and full sum of Two Hundred and Fifty Dollars ($250.00), conditioned, however, as follows: The aforesaid W. H. B. Simpson, Lucy C. B. Simpson, Mary Elizabeth Simpson, T. H. Bowden, Ansel M. Smith, Belk-Simpson Company of Abbeville, South Carolina, Inc., Belk's Department Store of Clinton, South Carolina, Inc., The Greenville Bargain House, a corporation of the State of South Carolina, did on the 4th day of August, 1955, file in the Office of the Clerk of the United States Court for the Middle District of Georgia, their notice of appeal in the case stated, under which the judgment of the District Court will be appealed to the United States Court of Appeals for the Fifth Circuit;

Now, Therefore, this bond is given in conformity with Rule 73(c) of the Federal Rules of Civil Procedure to secure the payment of costs if the appeal is dismissed or the judgment affirmed, or of such costs as the Appellate Court may award if the judgment is modified. If the principals hereof shall pay such costs, or if not, if the surety shall do so for

them, then this bond to be void; otherwise of full force and effect.

W. H. B. SIMPSON,
LUCY C. B. SIMPSON,
MARY ELIZABETH SIMPSON,
T. H. BOWDEN,
ANSEL M. SMITH,
BELK-SIMPSON COMPANY OF ABBEVILLE, S. C.
THE GREENVILLE BARGAIN HOUSE,
By W. H. B. SIMPSON, et. al., (L.S.)
H. B. MATHEWS,
Surety.

Filed Aug. 4, 1955.

STATEMENT OF THE POINTS ON WHICH THE APPELLANTS INTEND TO RELY ON THE APPEAL.

(Title Omitted.)

(1) The District Court of the United States for the Middle District of Georgia has and had no jurisdiction of this action;

(2) The District Judge erred in considering, ordering and adjudging that the motion to remand in this case should be denied;

(3) The action instituted by the appellants in the Superior Court of Bibb County, Georgia, was not an

action which "arises under the Constitution, laws or treaties of the United States";

(4) The District Judge erred in holding in his order of January 11, 1955, that the appellants' action was essentially one to enjoin, set aside, annul and suspend an order of the Interstate Commerce Commission;

(5) The District Judge should have held that the action was a proceeding in equity brought by minority stockholders under the provisions of Section 22-711 of the Code of Georgia of 1933; that the State Court had jurisdiction thereof; and that the Federal District Court had none.

This August 3rd, 1955.

CHARLES J. BLOCH,
Of Counsel for the Appellants.

Certificate.

I certify that I have served upon the appellees a copy of the aforesaid statement of the points on which the appellants intend to rely on the appeal, by transmitting a copy thereof by United States mail to Messrs. Harris, Russell, Weaver and Watkins, Persons Building, Macon, Georgia, and a copy to Mr. John B. Miller, Post Office Box 642, Savannah, Georgia, counsel for the defendants (appellees).

This August 3, 1955.

CHARLES J. BLOCH.

Filed Aug. 4, 1955.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

(Title Omitted.)

The plaintiffs did on the 3rd day of August, 1955, file with the Clerk of the District Court of the United States for the Middle District of Georgia, their notice of appeal herein.

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, the appellants now serve upon the appellees and file with the District Court, a designation of the portions of the record and proceedings to be contained in the record on appeal, and designate the following portions of the record and proceedings:

(1) The original petition filed by the plaintiffs in the Superior Court of Bibb County, Georgia, omitting process and service;

(2) The petition for removal filed by the defendants July 10, 1954;

(3) The motion to remand filed by the plaintiffs July 15, 1954;

(4) The order of United States Judge W. A. Bootle, dated January 11, 1955, in which it was considered, ordered and adjudged that the motion to remand be denied, together with the opinion of which the order was a part;

(5) The motion to dismiss for want of jurisdiction, filed by the defendants August 23, 1954;

(6) The order on said motion to dismiss, dated July 26, 1955, from which the appeal is taken;

(7) The notice of appeal;

(8) The bond on appeal;

(9) This designation;

(10) A concise statement of the points on which the appellants intend to rely on the appeal.

This August 3, 1955.

CHARLES J. BLOCH,
Of Counsel for the Appellants.

Certificate.

I certify that I have served upon the appellees a copy of the aforesaid designation by transmitting a copy thereof by United States mail to Messrs. Harris, Russell, Weaver and Watkins, Persons Building, Macon, Georgia, and a copy to Mr. John B. Miller, Post Office Box 642, Savannah, Georgia, counsel for the defendants (appellees).

This August 3, 1955.

CHARLES J. BLOCH.

Filed Aug. 4, 1955.

CLERK'S CERTIFICATE.

In the District Court of the United States for the Middle District of Georgia, Macon Division.

W. H. B. Simpson, Lucy C. B. Simpson, Mary Elizabeth Simpson, T. H. Bowden, Ansel M. Smith, Belk-Simpson Company of Abbeville, South Carolina, Inc., Belk's Department Store of Clinton, South Carolina, Inc., The Greenville Bargain House, a corporation of the State of South Carolina, Appellants,

vs. Civil Action No. 1156.

South Western Railroad Company and Central of Georgia Railway Company, Appellees.

I, JOHN P. COWART, Clerk of the District Court of the United States in and for the Middle District of Georgia, do hereby certify that the foregoing and attached 106 pages contain a true, full, complete and correct copy of the original record and all proceedings had in the above stated cause, as specified in the designation of contents of record on appeal of counsel herein and as the same remains of record and on file in the Clerk's Office of the said District Court at Macon, Georgia.

In Witness Whereof, I have hereunto set my hand and the official seal of the said District Court at Macon, Georgia, this the 17th day of August, 1955.

JOHN P. COWART,
(John P. Cowart),
Clerk.

(Seal)

FILED
JUN 6 1956
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 999 134

W. H. B. SIMPSON et al.,
Petitioners,

v.

SOUTHWESTERN RAILROAD COMPANY and CENTRAL OF GEORGIA RAILWAY COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals, Fifth Circuit.

CHARLES J. BLOCH,
520-4 First National Bank Building,
Macon, Georgia,
Attorney for Petitioners.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 1-4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

No. .....

W. H. B. SIMPSON et al.,
Petitioners,

v.

SOUTHWESTERN RAILROAD COMPANY and CENTRAL OF GEORGIA RAILWAY COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals, Fifth Circuit.

To the Honorable the Supreme Court of the United States, and the Justices Thereof:

The petition of W. H. B. Simpson, Lucy C. B. Simpson, Mary Elizabeth Simpson, T. H. Bowden, Ansel M. Smith, Belk-Simpson Company of Abbeville, South Carolina, Inc., Belk's Department Store of Clinton, South Carolina, Inc., and the Greenville Bargain House, a corporation of the State of South Carolina, respectfully shows:

1 (a):

They were the appellants in case No. 15,765 in the United States Court of Appeals, Fifth Circuit, in which South Western Railroad Company and Central of Georgia Railway Company were the appellees. The case was an appeal from the United States District Court for the Middle District of Georgia, Macon Division.

The petitioner is filing herewith nine copies of the record as printed for the use of the court below. The opinion of the District Judge appears at pages 78-116 thereof. It is reported at 128 Federal Supplement 532. The only other pertinent opinion is that of the Court of Appeals of the Fifth Circuit, a copy of which is appended hereto as Exhibit "A." It is reported at 231 F. 2d 59.

1 (b):

(I) The date of the judgment sought to be reviewed is March 20, 1956, which is the time of its entry;

(II) There is no order respecting a rehearing. There is no order granting an extension of time within which to petition for certiorari. The issuance of the mandate has been stayed by the Court of Appeals of the Fifth Circuit until June 18, 1956.

(III) The statutory provision believed to confer on the Supreme Court of the United States jurisdiction to review the judgment in question by writ of certiorari is Title 28, United States Code, Section 1254 (1). The time for the filing of this application is fixed by Title 28, United States Code, Section 2101 (c).

1 (c):

The questions presented for review, expressed in the terms and circumstances of the case are:

(I) Did the Superior Court of Bibb County, Georgia, a State Court having equity jurisdiction, have jurisdiction over an action brought by W. H. B. Simpson, et al., as minority stockholders of South Western Railroad Company, a Georgia Corporation, against that company, and its majority stockholder, Central of Georgia Railway Company, under a Georgia statute (Code of 1933, Section 22-711) permitting a minority stockholder to proceed in equity in behalf of himself and other stockholders for fraud or acts ultra vires against a corporation, its officers

and those participating therein despite the fact that the Interstate Commerce Commission had authorized the Central of Georgia Railway Company to enter into an operating agreement with South Western Railroad Company?

(II) Does the fact that the Interstate Commerce Commission had approved and authorized the Central of Georgia Railway Company to operate the properties of South Western Railroad Company, of which it is the majority stockholder, prevent minority stockholders from proceeding in equity in a state court against South Western Railroad Company and its majority stockholder and from obtaining relief in such court upon the ground that such arrangement is fraudulent and ultra vires as to South Western Railroad Company?

(III) Does such an action arise under the Constitution or laws of the United States when South Western Railroad Company was not authorized or empowered by the Interstate Commerce Commission in any respect?

(IV) Does a grant of authority by the Interstate Commerce Commission to an interstate carrier (which is the majority stockholder of another carrier) to operate, under contract, the properties of such other carrier affect the statutory obligations of such other carrier to its minority stockholders in a case where the Interstate Commerce Commission made no order with respect to the powers or authority of such other carrier?

(V) Does the grant of authority by the Interstate Commerce Commission to an interstate carrier (which is the majority stockholder of another carrier) to operate such other carrier affect the rights of minority stockholders of such other carrier?

(VI) Would the grant of authority by the Interstate Commerce Commission to Central of Georgia Railway Company to operate the physical properties of South Western Railroad Company, of which it was majority stockholder,

authorize it to take over assets of South Western Railroad Company in the amount of $81,241,549.37, in satisfaction of an alleged indebtedness theretofore disputed by South Western Railroad Company?

(VII) Would a suit in a state court by minority stockholders praying that until an accounting and judicial determination of all differences between South Western and Central was had, Central and South Western be enjoined from disposing of or changing the status of any assets of South Western Railroad Company be a suit arising under the Constitution or laws of the United States and thus removable to the Federal Court?

(VIII) Would such a suit praying that South Western Railroad Company render an accounting as to whether or not any of the securities or cash it had on hand at the time of taking of control by Central of Georgia had been expended and if so for what purpose, be one arising under the Constitution and laws of the United States? Would it be one to suspend, enjoin, annul or set aside in whole or in part an order of the Interstate Commerce Commission?

(IX) Was a cause of action asserted in the complaint other than that with respect to the validity of the operating agreement?

(X) Was the state court action one to enjoin conduct directed by an order of the Interstate Commerce Commission?

1 (d):

The Constitutional provisions, and the statutes which the case involves are:

(I) That part of Article III, Section 2, Paragraph 1 of the Constitution of the United States, which provides:

> "The judicial power shall extend to all cases, in Law and Equity, arising under the Constitution, the Laws of the United States . . . "

(II) Section 22-711 of the Code of Georgia of 1933, which is:

"A minority stockholder may proceed in equity in behalf of himself and other stockholders for fraud or acts ultra vires against a corporation, its officers and those participating therein, when he and they are injured thereby. But there must be shown—

"1. Some action or threatened action of the directors beyond the charter powers; or,

"2. Such a fraudulent transaction completed or threatened, among themselves or stockholders or others, as will result in serious injury to the company or other stockholders; or,

"3. That a majority of the directors are acting in their own interest in a manner destructive of the company, or of the rights of the other stockholders; or

"4. That the majority stockholders are oppressively and illegally pursuing, in the name of the corporation, a course in violation of the rights of the stockholders, which can only be restrained by a court of equity; and it must also appear—

"5. That petitioner has acted promptly; that he made an honest effort to obtain redress at the hands of the directors and stockholders, or why it could not be done, or it was not reasonable to require it; and

"6. That petitioner was a stockholder at the time of the transaction of which he complains, or that his shares have devolved on him since by operation of law."

(III) Title 28, United States Code, Section 1331:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

(IV) Title 28, United States Code, Section 1336:

"Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

June 25, 1948, c. 646, 62 Stat. 931.

(V) Title 28, United States Code, Section 1337:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

June 25, 1948, c. 646, 62 Stat. 931.

(VI) Title 28, United States Code, Section 2321:

"The procedure in a district court in actions to enforce, suspend, enjoin, annul or set aside, in whole or in part, any order of the Interstate Commerce Commission, other than for the payment of money or for the collection of fines, penalties and forfeitures shall be as provided in this chapter" (157).

(VII) Title 28, United States Code, Section 2322:

"All actions specified in Section 2321 of this title shall be brought by or against the United States."

(VIII) Title 28, United States Code, Section 2325:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a District Court of three judges under Section 2284 of this title."

(IX) Title 49, United States Code, Section 5 (2) (a):

"It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

"(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

"(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto."

(X) Title 49, United States Code, Section 5 (11):

"(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the

capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority, and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of powers under its corporate charter or under the laws of any State."

1 (e):

A concise statement of the case containing the facts material to the consideration of the questions presented:

The petitioners here on June 18, 1954, filed in the Superior Court of Bibb County, Georgia (a court of general equity jurisdiction), their bill against South Western Railroad Company and Central of Georgia Railway Company, both Georgia corporations. The bill alleged the following salient facts: The capital stock of South Western is

composed of 51,911 shares, of which petitioners own 664. Its properties are free of mortgage or other liens. On February 25, 1954, it had assets of $14,327,728.55 and owed $611.01. Central of Georgia owned 50,368 shares. Among the assets were bonds and certificates (U. S.) of a value of $1,241,549.37. Central had acquired its stock in South Western with the approval of the Interstate Commerce Commission in 1953.

South Western comprises some 340 miles of railroad. In 1932 its properties were being operated by Central under a lease. In an equity cause in the Federal District Court, a receiver was appointed on December 19, 1932, of the properties and assets of Central. He continued to operate properties of South Western, having adopted the lease.

Eight years later (1940) trustees were appointed for Central in the same court under the provisions of the Federal Bankruptcy Act. These trustees adopted the lease of South Western on a modified basis which for the period June, 1940, to June, 1943, produced to the South Western a net income of almost a million and a half dollars. On July 1, 1943, this modified lease contract was terminated and thereafter and until June 30, 1948, the properties were operated by the trustees under lease.

During this interval a plan of reorganization of Central was promulgated by the Interstate Commerce Commission. The plan contained a provision for the acquisition of South Western's properties by Central. Some of South Western's stockholders objected to that proposed acquisition and were successful in their efforts to prevent. This success resulted from considerable litigation which reached this Court (336 U. S. 132—see, also, 206 Ga. 770, certiorari denied 340 U. S. 815).

This litigation ended October 9, 1950. That was the date when Central definitely ascertained that it could not

acquire the properties of South Western on the terms proposed by it and approved by the Commission.

In the meantime, the properties of South Western had been operated by Central. This operation was under the lease aforesaid through June 30, 1948. Subsequent to June 30, 1948, the operation was under an order of the Bankruptcy Court of March 5, 1948, which provided that the reorganized Central should "operate the lines of the South Western for the account of South Western subject to the jurisdiction of this court" (Record, pages 14-15). No rental was prescribed. **No formula or method of fixing a rental was prescribed or set out in the order of March 5, 1948.**

When the operations, pursuant to the order, commenced on July 1, 1948, there was no agreement between Central and South Western as to a formula under which operations should proceed, and there has been none since except the one which gave rise to the present litigation.

After the termination of the litigation, Mr. B. J. Tarbutton, who had been a director of South Western, resigned on October 24, 1950. He shortly after became President of Central. At that time Central was contending that its operations of South Western's properties was under a formula which had been in effect from 1940 to 1943. South Western contended to the contrary. There was a grave dispute between South Western and Central as to this. The details of this dispute were set out thoroughly in the bill (Record, 15-21). This dispute has never been judicially determined.

On January 16, 1951, Central sent to stockholders of South Western an offer to purchase a majority of the stock of South Western, and a few days later applied to the Interstate Commerce Commission for authority under Section 5 (2) of the Interstate Commerce Act to acquire control of South Western through a purchase of a majority

of its capital stock. Certain stockholders objected. After several hearings, their objections were overruled by the Commission. The Commission's action was in effect affirmed by a Three-Judge Court (114 F. Supp. 37) (August 24, 1953).

On March 11, 1954, the regular annual meeting of South Western was held. At it all of South Western's directors and its counsel were removed and replaced by Central's officers and counsel. At it, by a vote of the stock owned by Central, B. J. Tarbutton, who was then president of Central, was elected president of South Western.

Just prior to that, on February 25, 1954, Mr. Wallace Miller was president of South Western. He was one of those removed at the March 11 meeting a few weeks later. As president, he submitted to the stockholders of South Western a report of the affairs of the company (R. 24, 46). In that report he set out that Central was claiming that South Western owed it $1,239,421.40. (Coincidentally, perhaps, that amount was within $2,000.00 of the value of South Western's bonds and treasury certificates.) He reported that Central had made a demand for payment (R. 48) which had been refused by South Western. He stated: "A judicial determination of all differences between South Western and the Central, arising out of Central's operation of South Western, should be had to the end that the reasonable and fair rental value of Central's use and enjoyment of South Western's railroads since July 1, 1948, may be ascertained."

He also reported (R. 49) that on January 20, 1954, South Western's directors were notified by Central that at the March 11, 1954, meeting all of South Western's directors and its counsel would be removed and replaced by Central's officers and counsel.

As we have pointed out, that promise or threat was carried out at the March 11 meeting.

And at that meeting, too, there was introduced and passed by a vote of the Central stock, a resolution authorizing the execution of a contract for the operation of the properties of South Western by Central. This resolution, exhibited to the bill (R. 51) authorized the execution of an operating agreement "provided that said agreement shall not take effect until it has been approved by the Interstate Commerce Commission . . ."

The contract or operating agreement referred to in the resolution was also exhibited to the Bill (R. 51-58). It also provided that it would not "become effective until it has been approved by the Interstate Commerce Commission."

Thereafter, on May 3, 1954, petitioners sought to have South Western (R. 59) not execute the contract, or that if executed, it be canceled.

South Western's president replied on May 11 that the contract had been executed by South Western on March 11, 1954. These dates are important, because it was not until May 14, 1954 (R. 107) that the Interstate Commerce Commission approved the operating agreement.

The suit was filed in Bibb Superior Court on June 18, 1954. After alleging the facts hereinbefore summarized, it alleged:

(a) The resolution adopted by the stockholders of South Western on March 11, 1954, authorizing the execution of the operating agreement was beyond the powers of that corporation;

(b) Under the laws of Georgia a railroad corporation cannot without special authority of statute alienate its franchise or property essential to the performance of its duty to the public, whether by sale, mortgage or lease;

(c) Under the laws of Georgia, South Western had no legal authority or right to execute, enter or otherwise bind itself by the operating agreement;

(d) The charter of South Western does not permit it to lease its properties in the manner proposed by the agreement, nor does it permit it to contract with another corporation for the operation of its properties (R. 26-27).

There were other allegations with respect to South Western (R. 29).

So the suit in these respects was aimed at South Western and its powers which were not altered by any order of the Interstate Commerce Commission.

And the suit alleged that the Central "as majority stockholder of South Western Railroad Company is, by procuring the execution of the aforesaid contract and operating the properties of South Western under it, oppressively and illegally pursuing in the name of South Western Railroad Company, a course in violation of the rights of the stockholders, which can only be restrained by a court of equity."

Then followed a detailed story of the relationship between Central and South Western over the period 1940-1954.

The rental was alleged to be grossly inadequate.

The suit particularly sought to prevent the Central's taking over South Western's current assets of about a quarter of a million dollars until it could be judicially determined whether South Western was indebted to Central, and, if so, in what amount. Central claimed that South Western owed it approximately $1,239,000.00. South Western had in its treasury bonds and United States certificates of indebtedness of almost that exact amount. South Western, while under management other than that of Central's officers and employees, had constantly taken the position that it was not indebted to Central. The suit sought to prevent Central, which had elected its officers and employees as officers and directors of South Western, from diverting

South Western's assets into Central's treasury by a "payment" of this alleged debt. That was the purpose of prayers (f), (g), (h) and (i) of the petition (R. 41-42).

The suit also prayed for a decree adjudging the so-called operating agreement to be null and void; that it be cancelled, and that operations under it constitute a course illegally and oppressively pursued in the name of South Western by Central, its majority stockholder, which course is in violation of the rights of the petitioners and other stockholders similarly situated.

The defendants removed the case to the District Court of the United States for the Middle District of Georgia (R. 71-73).

The petitioners moved to remand (R. 76-78).

The District Judge denied the motion to remand. In his opinion, so doing, he called attention to the fact that "it was stated in oral argument, and not denied, that the Commission had on May 14, 1954, specifically approved the operating agreement." Furthermore, the defensive pleadings, he stated, alleged that the operating agreement had been approved by the Interstate Commerce Commission. In his opinion there are excerpts from the report and the order (R. 107-8).

We did not and do not question the fact that on May 14, 1954, the Central had been authorized by the Commission to operate the properties of South Western, and that such operation was approved.

We did and do question the effect of that authorization and approval.

After the denial of the motion to remand, the District Judge dismissed the petition without prejudice (R. 121).

Upon appeal the Court of Appeals affirmed.

1 (f):

Review of a judgment of a state court is not sought.

1 (g):

Petitioners contend that there was no basis for federal jurisdiction, and that the case was erroneously removed from the Superior Court of Bibb County, Georgia, to the District Court of the United States for the Middle District of Georgia. They so contended in their motion to remand (R. 76). Respondents here, defendants below, in their petition for removal contended that the controversy set forth in our petition arose under the laws of the United States, and the sum or value in controversy exceeded the sum of $3,000 exclusive of interest and costs. They also contended that the suit was a civil action in which it was sought to enjoin, set aside, annul or suspend in whole or in part an order of the Interstate Commerce Commission.

1 (h):

A direct and concise argument amplifying the reasons relied on for the allowance of the writ.

Petitioners contend that the United States Court of Appeals, Fifth Circuit, has in this case decided important questions of federal law which has not been, but should be, settled by the Supreme Court of the United States.

The Interstate Commerce Commission upon the application of Central of Georgia Railway Company authorized it to operate the properties of South Western Railroad Company of which it was majority stockholder. Does such an order affect the rights of minority stockholders of South Western so as to prevent their asserting their rights as such minority stockholders under state law in a suit in the proper state court? Does such an order in any way affect the obligations of Central as a majority stockholder in South Western to minority stockholders?

The gist of the District Judge's opinion was that petitioners were seeking to cancel the operating agreement which "was not to take effect, could not take effect, and did not take effect until it was specifically approved by the Interstate Commerce Commission" (R. 106-107).

While petitioners prayed "that the so-called operating agreement be cancelled" (R. 41), this prayer immediately followed two others:

> "That it be decreed by this Court that the so-called 'operating agreement' is ultra vires, null and void, and that the properties of South Western may not be operated by Central of Georgia Railway Company under its terms";
>
> "That it be decreed by this Court that the so-called 'operating agreement' and operations under it are transactions which will result in serious injury to South Western Railroad Company, your petitioners and other stockholders similarly situated."

Petitioners did pray that the so-called operating agreement be cancelled. This prayer was based on the fact that **South Western** had no power to enter into it, and that **South Western's** becoming a party to it violated Georgia statutes. The Central applied to the Interstate Commerce Commission. South Western was not the applicant. The power under Section 5 (11) of the Interstate Commerce Act (R. 109) was granted to Central. After the Commission's order **South Western** had no more legal authority to enter into the contract than it had before the order. The Commission did not attempt to invest South Western with any power or authority. So petitioners were not attempting to set aside the Commission's order. They were trying to set aside the contract because **South Western** had no power to enter into it, and had not been invested with any such power even if the Commission had authority so to invest South Western. Furthermore, the power or authority

granted to Central was a grant to it as a carrier, and did not alter its obligations under the Georgia law as a majority stockholder in a Georgia corporation. The authority granted by the Commission to Central did not authorize it as the majority stockholder of South Western to pay over to itself a million and a quarter dollars from the treasury of South Western in satisfaction of an alleged indebtedness which had been disputed by South Western down through the years. Hence, prayers e-i (R. 41-42) of the petition which dealt with a matter not even remotely connected with the Commission's order or authorized by it.

When the judgment of the District Court was affirmed by the Court of Appeals it stated:

> "The principal question decided by the trial court and the principal question presented on appeal is whether an action ostensibly posited on a state statute authorizing a minority stockholder suit against their own corporation, and an allegedly oppressive majority, acting for their own and not the corporation's interests is nevertheless a civil action of which the district courts have original jurisdiction founded on a claim or right arising under the constitution, treaties or laws of the United States and is thus removable to the Federal Court if it seeks, in fact, to have the state court enjoin or suspend a **course of action** which the Interstate Commerce Commission has specifically authorized by appropriate order" (Opinion, p. 2). (Emphasis supplied.)

The Interstate Commerce Commission did not authorize a **"course of action."**

The Commission authorized "the operation, under contract by the Central of Georgia Railway Company, of all of the properties of the South Western Railroad Company as described in the report aforesaid, upon the terms and conditions in said report found just and reasonable, be, and it is hereby, approved and authorized" (R. 108).

The Commission authorized Central to operate the properties. It did not authorize Central as majority stockholder to use the assets of South Western as it saw fit. It did not authorize South Western to do anything. If South Western was impotent under Georgia law to enter into the contract, no potency was supplied to South Western by the Commission.

Petitioners are not attempting to set aside, annul or suspend the **order** of the Commission.

Petitioners are attempting to prevent operation under the order for the reason that South Western has no legal authority to permit such operation either under Georgia law or the Commission's order.

We do not seek to set aside the Commission's order, for the Commission did not seek to invest South Western with any power it did not have under its charter.

In addition to seeking to prevent such operation, the petitioners sought other relief peculiarly founded on the Georgia statute.

The Court of Appeals at page 5 of its opinion said:

> "Several basic facts emerge from even this short recitation of allegations and prayer for relief. The **first** is that the complaint definitely asked the Superior Court of Bibb County, Georgia, to **enjoin the operation of an agreement** which had been authorized by the Interstate Commerce Commission. The court may take judicial notice of such order. The **second** is the fact that the complaint did not purport on its face to touch on any order of the Commission, although one had in fact been entered prior to the filing of the suit. The third is that **no cause of action is asserted in the complaint other than that attacking the validity of the operating agreement** and the right of the plaintiffs to bring the action under the Georgia statute, there being no separate cause of action for an account-

ing between the two corporations or an action for damages for improper management for prior years or a showing of irreparable injury or insolvency of the defendants to support an action to enjoin the transfer of securities alone." (Emphasis supplied.)

There, first, the Court said we sought to "enjoin the operation of an agreement which had been authorized by the Interstate Commerce Commission."

What we did do, was to ask that the Court decree the operating agreement to be ultra vires, null and void (R. 41), and that therefore it be cancelled.

What we did do, therefore, was to ask the Court to decree the agreement null and void despite the fact that it appeared aliunde our petition the Commission had authorized Central, one party to it, to enter into it, **because** the other contracting party, South Western, was not legally authorized to enter into it.

There, secondly, the Court alluded to the fact that our complaint did not purport on its face to touch on any order of the Commission. No order of the Commission had been promulgated when, on May 3, 1954 (R. 59), petitioners "sought redress" from South Western as they were required to do under the Georgia statute. The reply of South Western's president (R. 65), dated May 11, 1954, did not refer to any order of the Commission with respect to the operation of the properties. No such order was promulgated until May 14, 1954. When we learned of its promulgation after the filing of the suit we deemed it immaterial to the questions presented, for the order conferred no power or authority on South Western. The Commission did not seek to amend South Western's charter. Nor did it seek to amend Georgia statutes dealing with the rights of minority stockholders, and the reciprocal rights and duties of majority and minority stockholders of Georgia corporations.

Thirdly, the court said that no cause of action was asserted in the complaint other than that attacking the validity of the operating agreement. This finding was based on the statement that there was no cause of action for an accounting between the two corporations or an action for damages or a showing of irreparable injury or insolvency.

The Georgia statute upon which our cause of action was based (Code of 1933, Section 22-711) does not require that we, in proceeding under it, seek an accounting or pray for damages or show irreparable injury or insolvency.

The Georgia statute provides that a minority stockholder may proceed in equity for fraud or acts ultra vires against a corporation, its officers and those participating therein, when he and they are injured thereby if certain facts are shown. Among those facts are (1) some action or threatened action of the directors beyond the charter powers; or . . . (3) that a majority of the directors are acting in their own interest in a manner destructive of the company, or of the rights of other stockholders; or, rights of other stockholders; or (4) that the majority stockholders are oppressively and illegally pursuing, in the name of the corporation, a course in violation of the rights of the stockholders, which can only be restrained by a court of equity.

All that we alleged. Therefore there was an independent cause of action set out in which minority stockholders were plaintiffs, and the corporation and its majority stockholder were defendants.

If naught had appeared but that South Western had no charter power to become a party to the so-called operating agreement, a cause of action would have been stated under Code Section 22-711 (1).

Upson County Railroad Co. v. Sharman, 37 Ga. 644.

A fortiori, was such a cause of action stated when it was shown that separate and apart from the operation of the physical properties of the South Western, Central was acting in its own interest in a manner destructive of South Western?

The Court of Appeals at page 6 of its opinion said:

> "It seems to us that the appellants are here forced into the narrow position of arguing that this is not a suit to 'suspend, enjoin, annul or set aside' an **order** of the Interstate Commerce Commission because all it seeks is to suspend, enjoin, annul and set aside a **course of action** that the Commission order has approved and authorized."

That is not our position. We should not be forced into any such position.

Our position is that we are proceeding against persons—South Western Railroad and Central of Georgia Railway Company. We as stockholders of South Western Railroad Company proceeded against it and its majority stockholder to prevent it (South Western) from entering into or operating under a contract which was beyond its charter powers (Cf. **Brushaber v. Union Pacific Ry. Co.**, 240 U. S. 1).

Our position we thought was stated at pages 42-48 of our brief in the Court of Appeals, which we quote:

> "The order of the Commission here at issue did not appear in our petition in the State Court. It is quoted in the District Judge's opinion at pages 107-108 of the Record. We respectfully submit that granting for the sake of the argument that that order is properly in this record and before the Court, it cannot be construed as decisive of Central of Georgia's obligations and duties as a majority stockholder (Cf. Central New England Ry. Co. v. Boston & A. R. Co., 279 U. S. 415, referred to by this Court at page 821 of the Gulf,

Mobile & Ohio R. Co. case, supra. See, also, Regents of University System of Georgia v. Carroll, 338 U. S. 586, 70 S. Ct. 370, 94 L. Ed. 363, discussed by this Court at page 822 of the Gulf, Mobile & Ohio case).

"'The operation' (R. 108) 'under contract by the Central of Georgia Railway Company of all the properties of the South Western Railroad Company . . . upon the terms and conditions in said report found just and reasonable . . . '

"Even if the Commission had any power to determine the relationship between Central and South Western as a majority stockholder of the former in the latter, and its duties and obligations to minority stockholders, the Commission did not attempt so to do (R. 107).

"We submit that it could **not** have done so (see Benton v. South Western R. Co., 206 Ga. 770, certiorari denied 340 U. S. 815); but we need not concern ourselves further with that problem. The Commission simply did not attempt to decide whether the contract violated Central's obligations as a majority stockholder in South Western to minority stockholders in that company.

"**Lambert Run Coal Co. v. Baltimore & Ohio R. Co.,** 258 U. S. 377, 66 L. Ed. 671, treated by the District Judge in his opinion (R. 110), dealt with an order of the Commission promulgating rules in regard to the distribution of coal cars in a time of car shortage. At page 381 of that opinion the Court said: 'The rule of the railroad here complained of was that **prescribed by the Commission.** To that rule the railroad was **bound to conform** unless relieved by the Commission or enjoined from complying with it by decree of a court having jurisdiction.' (Emphasis ours.)

"In the first place, as the District Judge later (R. 111) pointed out, that order was mandatory, while the

order here was permissive only. But the salient difference is that there the Commission was dealing purely and simply with a railroad operating problem which involved merely the carrier's duty as a carrier. It did not involve the railroad company's obligations, duties and authority **as a corporation.** It did not involve its duties and responsibilities as a majority stockholder in a corporation to minority stockholders which are matters of state law.

"The District Judge in referring to the fact that the order was 'permissive only' (R. 111) said that the Supreme Court ruled 'in the later case of Venner v. Michigan Central Railroad Co., 271 U. S. 127, 70 L. Ed. 868, that such a distinction is inconsequential.' The District Judge did not allude to the difference which we have denominated just hereinabove 'the salient difference.'

"The quotation which the District Judge (R. 112) made from the Venner case shows that the amended bill there assails **'the validity of the order'** of the Commission (271 U. S., at page 130).

"The District Judge might also have said that the opinion of the Court there showed that the plaintiff in the Venner case 'also alleges that the order, and the provisions of section 20a (of the Interstate Commerce Act) under which it was made, transcend the limits of federal power, and encroach on the power of the states before named. The prayer is that the defendant company be enjoined from carrying out the agreement, notwithstanding its approval by the Interstate Commerce Commission under that section' (271 U. S., at page 129).

"We made no such assault on the order of the Commission. As a matter of fact, we did not 'assail' it at all. We did not plead it, or refer to it. It was plead by the defendants (appellees), and referred to

by their counsel in the oral argument (R. 107). The report and order are quoted by the District Judge (R. 107-108) as they appear in the 'defensive pleadings' (R. 107).

"Assuming that the defensive pleadings might have been considered by the Court in passing on the motion before the Court, it will readily become apparent:

"(a) That the **report** of the Commission merely found 'that the operation under contract by the Central of Georgia Railway Company of all the properties of the South Western Railroad Company, as described herein, is a transaction within the **scope** of section 5 (2) of the Interstate Commerce Act, as amended, that the terms and conditions are **just and reasonable,** and that the transaction will be consistent with the public interest.' (Emphasis ours.)

"(b) That the order (R. 107-8) of the Commission merely 'approved and authorized' 'the operation, under contract by the Central of Georgia Railway Company of all of the properties of the South Western Railroad Company, as described in the report aforesaid, upon the terms and conditions in said report found just and reasonable . . .'

"The Commission **did not** (even if it could have) pass upon the contention of minority stockholders of South Western, that the '"operating agreement" and operations under it are transactions which will result in serious injury to South Western Railroad Company, your petitioners and other stockholders similarly situated.'

[Prayer 80 (c) of our petition, R. 41.]

"The Commission **did not** (even if it could have) pass upon the contention of minority stockholders of South Western 'that the so-called operating agreement and operations under it constitute a course op-

pressively and illegally pursued in the name of South Western Railroad Company by the majority stockholder Central of Georgia Railway Company which course is in violation of the rights of your petitioners and other stockholders similarly situated';

[Prayer 80 (e) of our petition, R. 41.]

"Neither did the Commission pass upon the contention of minority stockholders of South Western 'that until a judicial determination of all differences between South Western and Central of Georgia Railway Company, arising out of Central's operations of South Western's properties has been had to the end that the reasonable and fair rental value of Central's use and enjoyment of South Western's railroads since July 1, 1948, and in the future until further order of this Court, has been ascertained, that the operation by Central . . . of South Western's properties under the so-called operating agreement be restrained and enjoined.'

[Prayer 80 (f), R. 41.]

"Neither did the Commission pass upon the minority stockholders' prayer for an injunction against South Western and Central enjoining the expenditure of assets of South Western [Prayers 80 (g), (h) and (i), R. 42.]

" 'In this case, however, we find no fraudulent attempt to evade removal by the plaintiffs in the state court, because the rights which they sought to enforce were not claimed to be founded upon the constitution or statutes of the United States or upon any order of the Interstate Commerce Commission, and if the defendants in the state court had any defenses based thereon, the state courts are just as bound as are the Federal Courts to recognize and give effect to such defenses subject to the ultimate rights of the

parties to seek review in the Supreme Court of the United States.' **Romick v. Bekins Van & Storage Co.**, 197 F. 2d 369 (Fifth Circuit).

"We respectfully assert that that ruling applies with full force here. We stated in the argument in the lower court that when we filed our petition in the state court on June 18, 1954 (R. 70), we were not aware of the Commission's order of May 14, 1954. If we had been aware of it, while we probably would have referred to it, we would nevertheless have filed our suit in the State Court and insisted on its jurisdiction for the reason that our suit was not founded upon the Constitution or statutes of the United States, or upon any order of the Interstate Commerce Commission, nor were we attempting to annul, suspend or set aside an order of the Interstate Commerce Commission. On the contrary, we were, on behalf of minority stockholders, asserting their rights as such against a majority stockholder, rights with which the Commission had nothing to do, and which the Commission had not attempted to adjudicate.

"The distinction between Venner v. Michigan Central R. Co., 271 U. S. 127, supra, and the case before the Court is aptly illustrated by the case of Central New England R. Co. v. Boston & A. R. Co., 279 U. S. 415, 73 L. Ed. 776, 49 S. Ct. 358, where at page 420 the Venner case (and the Lambert case) are distinguished, and at page 421 says:

> " '**Here respondent does not ask that the order be set aside or that it be regarded as illegal and void**; it insists only that the order did not purport to deal with the contract between the carriers, and so cannot have the effect attributed to it by petitioner of annulling the contract. The question is merely one of the legal effect of the order. Neither party contests its validity or asks that the

carrier be compelled to do anything inconsistent with its terms.' (Emphasis ours.)

"('Its terms' do not compel, they authorize.)

"Therefore in the opinion (page 420) the Court has said:

"'Petitioner also challenged the jurisdiction of the state court. As the suit is upon contract and does not assail the order of the Commission, it is not one to "enjoin, set aside, annul or suspend" an order of the Commission of which the Federal districts courts are given exclusive jurisdiction under . . . the Judicial Code . . . Hence the state court retained its jurisdiction to give "remedies now existing at common law" preserved by section 22 of the Interstate Commerce Act (49 U. S. C. A., Sec. 22) (Author's note: In re 49 U. S. C. A., Sec. 22, p. 377, lines 13-14, after the words "at common law" are words "or by statute") . . . and subject to the power of revision by this court it could construe the order of the Commission. Great Northern Railway Co. v. Merchants Elevator Co., 259 U. S. 285, 42 S. Ct. 477, 66 L. Ed. 943.'"

1 (i):

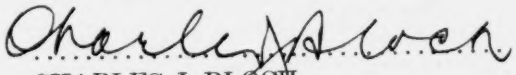
A copy of the opinion of the Court of Appeals of the Fifth Circuit is appended hereto as Exhibit "A".

Petitioners are filing with this petition nine copies of the record as printed for the use of the court below, under the provisions of paragraph 4 of Rule 21. The opinion of the Court of Appeals is the only pertinent opinion not contained therein.

Wherefore, petitioners pray that this Honorable Court grant the writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review its decision in its

case No. 15,765, W. H. B. Simpson et al., Appellants, versus South Western Railroad Company and Central of Georgia Railway Company, Appellees, decided by it March 20, 1956.

Respectfully submitted,



CHARLES J. BLOCH,
520-4 First National Bank Building,
Macon, Georgia,
Attorney for Petitioners.

Certificate of Service.

I certify that I have served a copy of the within and foregoing petition for certiorari upon South Western Railroad Company and Central of Georgia Railway Company by depositing a copy thereof in a United States mail box, with first-class postage prepaid, addressed to their counsel of record at their respective post office addresses as follows:

John B. Miller, Esq.,
26 East Bryan Street,
Savannah, Georgia.

Walter A. Harris, Esq.,
Persons Building,
Macon, Georgia.

H. D. Russell, Esq.,
Persons Buiiding,
Macon, Georgia.

I further certify that neither of these persons resides 500 miles or more from the person effecting service.

This ....., 1956.

.....

EXHIBIT "A".

In the
UNITED STATES COURT OF APPEALS
For the Fifth Circuit.

No. 15765.

W. H. B. Simpson et al.,
Appellants,

versus

South Western Railroad Company and Central of Georgia Railway Company,
Appellees.

Appeal from the United States District Court for the Middle District of Georgia.

(March 20, 1956.)

Before Borah, Tuttle and Brown, Circuit Judges.

Tuttle, Circuit Judge: This is an appeal from an order of the District Court denying a motion to remand to the state court and an order dismissing the complaint originally filed by appellants, as minority stockholders of the South Western Railroad Company[1] against their own corporation, its directors and officers and the Central of

[1] Plaintiffs owned 664 out of 51,911 shares, approximately 1¼% of the capital stock.

Georgia Railway Company, alleging that under the provisions of a Georgia statute they were proceeding to prevent an ultra vires act in the nature of an agreement between South Western and Central whereby Central was to take possession of and operate all the railroad facilities of South Western.

The principal question decided by the trial court and the principal question presented on appeal is whether an action ostensibly posited on a state statute authorizing a minority stockholder suit against their own corporation, and an allegedly oppressive majority, acting for their own and not the corporation's interests, is nevertheless a "civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States[2] and is thus removable to the Federal Court if it seeks, in fact, to have the state court enjoin or suspend or set aside a course of action which the Interstate Commerce Commission has specifically authorized by appropriate order. The relevant sections from the statute which appellees point to as the laws of the United States on which appellant's right is founded are reproduced in the margin.[3]

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[2] 28 U. S. C. A., § 1441 (a) and (b).

[3] 28 U. S. C. A., § 1336:

"Except as otherwise provided by Act of Congress, the district court shall have jurisdiction of any civil action to enforce, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission. June 25, 1948, c. 646, 62 Stat. 931."

28 U. S. C. A., § 1337:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. June 25, 1948, c. 646, 62 Stat. 931."

28 U. S. C. A., § 2321:

"The procedure in a district court in actions to enforce, suspend, enjoin, annul or set aside, in whole or in part, any order

Litigation between these parties or others asserting substantially the same conflict of interests has been long and arduous. It has been before this court previously in other aspects in **Benton v. Callaway**, 165 F. 2d 877, affirmed sub nom. **Callaway v. Benton**, 336 U. S. 132. It has been before a three judge district court in **Benton et al. v. United States et al.**, 114 F. Supp. 37, and before the Supreme Court of Georgia in 206 Ga. 770, 58 S. E. 2d 905, cert. den. 340 U. S. 815. The fact that there has already been a long story of litigation involving the effort of this small minority of the stockholders to achieve an opportunity to challenge what has seemed best for the corporation to the overwhelming majority, does not prevent our treating this chapter of the story with all the consideration which litigants have the right to command, when, as here, they appear to be standing on what they urge as rights accorded them under state laws. The failure of this court to repeat in wealth of detail all of the allegations of the complaint does not justify the conclusion that we have not carefully reviewed them in testing the analysis made of them by the trial court. Such omission from this opinion is made possible by the very excellent statement of the case by the able trial judge in his opinion which is reported at 128 F. Supp. 532.

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of the Interstate Commerce Commission, other than for the payment of money or for the collection of fines, penalties and forfeitures, shall be as provided in this chapter. (No. 157.)"

28 U. S. C. A., § 2322:

"All actions specified in Section 2321 of this title shall be brought by or against the United States."

28 U. S. C. A., § 2325:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a District Court of three judges under Section 2284 of this title."

In essence the appellants charge that the Central of Georgia Railway Company had acquired some 98% of the stock in South Western; that the interests of the majority were thus to favor Central; that Central selected the directors, eliminating any who were not Central employees; that there existed a dispute between South Western and Central as to the state of accounts between them resulting from operations subsequent to 1948; that Central's representatives on South Western's board were not interested or alert in asserting the point of view of South Western; that the new board, with majority stockholder's approval, had negotiated an agreement with Central to operate the railroad properties of South Western on terms unfair to South Western stockholders other than Central, such operating agreement being subject to the approval of the Interstate Commerce Commission; that such agreement amounted to a lease of the South Western road and transfer of its franchise, which was ultra vires and void under the Georgia laws; that South Western had some $1,200,000 worth of bonds and other liquid assets which had been turned over to the new officers upon their taking control.

Having thus charged, appellants prayed the court to decree the operating agreement to be "ultra vires, null and void"; that it would cause serious injury to South Western and it was oppressive; that it be cancelled and operations under it be restrained and enjoined; that an accounting be rendered by defendants as to the disposition of the securities with a return of any of them that might have been transferred to Central in satisfaction of any alleged indebtedness or for any other purpose, pending a final determination of "all differences between South Western and Central."

Several basic facts emerge from even this short recitation of allegations and prayer for relief. The first is that the complaint definitely asked the Superior Court of Bibb County, Georgia, to enjoin the operation of an agreement

which had been authorized by the Interstate Commerce Commission. The court may take judicial notice of such order. The second is the fact that the complaint did not purport on its face to touch on any order of the Commission, although one had in fact been entered prior to the filing of the suit. The third is that no cause of action is asserted in the complaint other than that attacking the validity of the operating agreement and the right of the plaintiffs to bring the action under the Georgia statute, there being no separate cause of action for an accounting between the two corporations or an action for damages for improper management for prior years or a showing of irreparable injury or insolvency of defendants to support an action to enjoin the transfer of securities alone.

Thus, there is here nothing more or less than a state court suit seeking to prevent the defendants from carrying out an operating agreement between two railroad companies, both admittedly subject to all proper action of the Interstate Commerce Commission, which at the time of the filing of the suit had entered an order specifically authorizing it.[4]

It seems to us that the appellants are here forced into the narrow position of arguing that this suit is not a suit

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[4] The order of the Commission follows:

"Investigation of the matters and things involved in this proceeding having been made, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

"It is ordered, That, subject to the conditions for the protection of railroad employees referred to in said report, the operation, under contract by the Central of Georgia Railway Company of all of the properties of the South Western Railroad Company, as described in the report aforesaid, upon the terms and conditions in said report found just and reasonable, be, and it is hereby, approved and authorized." See Finance Docket No. 18465, South Western Railroad Company Operation, Decided May 14, 1954, not printed in full in I. C. C. Reports but referred to in 290 I. C. C. 812.

to "suspend, enjoin, annul or set aside" an **order** of the Interstate Commerce Commission because all it seeks is to suspend, enjoin, annul and set aside a **course of action** that the Commission order has approved and authorized. Further, it appears that this position is supportable, if at all, on two grounds: first, that the complaint must be looked at without reference to any outside pleadings or documents to determine whether it is a suit which "arises under the Constitution, laws or treaties of the United States"; second, that if the order of the I. C. C. is to be considered, it is only permissive, and a suit to enjoin action **authorized** by the Commission is not a suit to enjoin an order of the Commission.

We find that both of these propositions have been decided against the contention of the appellants by the Supreme Court, the first in **Lambert Run Coal Co. v. Baltimore & Ohio R. R. Co.**,[5] and the second in **Chas. H. Venner v. Michigan Central R. R. Company.**[6]

Under our constitutional system Congress, of course, has plenary power to regulate commerce among the states. It had full power, therefore, to create the Interstate Commerce Commission and to prescribe its duties, giving to it such powers as necessary to accomplish its purpose, even though they might override powers otherwise belonging to the states. It also, of course, has full power to prescribe limitations on reviews and appeals from the actions of the Commission. This it has done in providing: that "the district court shall have jurisdiction of any civil action to enforce, set aside, annul or suspend in whole or in part, any order of the Interstate Commerce Commission"[7]; that "the procedure in a district court in actions to enforce, suspend, enjoin, annul or set aside, in whole or in part, any

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[5] 258 U. S. 377, 66 L. Ed. 671, 42 S. Ct. 349.

[6] 271 U. S. 127, 70 L. Ed. 868, 46 S. Ct. 444.

[7] 28 U. S. C. A., § 1336.

order of the Interstate Commerce Commission . . . shall be as provided in this chapter"[8]; that "all actions specified in section 2321 of this Title shall be brought by or against the United States"[9]; and that "an interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a District Court of three judges under § 2284 of this Title."[10]

In the Lambert Run Coal Company case, supra, the plaintiff brought an action in the state court to enjoin the defendant railroad from following rules for the distribution of cars which had been prescribed by the Interstate Commerce Commission. The suit made no mention of this latter fact. The suit was remanded, and the district court, sitting without invoking a three judge court, granted an injunction. The Supreme Court, on appeal, affirmed the action of the Court of Appeals for the Fourth Circuit in reversing the judgment of the district court, but further held that the Court of Appeals should have ordered a dismissal of the case. The Supreme Court said:

> ". . . The fact that this was a suit to set aside an order of the Commission did not appear on the face of the bill; but it became apparent as soon as the motion to dismiss was filed. Jurisdiction cannot be effectively acquired by concealing for a time the facts which conclusively establish that it does not exist. As the state court was without jurisdiction over either the subject-matter or the United States, the District Court could not acquire jurisdiction over them by the

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[8] 28 U. S. C. A., § 2321.

[9] 28 U. S. C. A., § 2322.

[10] 28 U. S. C. A., § 2325.

removal. The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction. Courtney v. Pradt, 196 U. S. 89, 92; American Well Works Co. v. Layne & Bowler Co., 241 U. S. 257, 258."

Appellee seeks to distinguish this case from Lambert by pointing to the fact that the question of removal was not present in Lambert. However, there is in that case reasoning which when applied here makes it authority for the action of the trial court in denying the remand. The Supreme Court said:

"But there are in addition two fundamental objections to the jurisdiction. First, the United States, an indispensable party to suits to restrain or set aside orders of the Commission, was not joined, and could not be, for it has not consented to be sued in state courts. Secondly, such suits are required to be brought in a federal District Court. Judicial Code, §§ 208, 211; Act of October 22, 1913, c. 32, 38 Stat. 208, 219; Illinois Central R. R. Co. v. State Public Utilities Commission, 245 U. S. 493, 504; North Dakota v. Chicago & Northwestern Ry. Co., 257 U. S. 485; Texas v. Interstate Commerce Commission, ante, 158 . . ."

If, as said by the Court there, such suits as this "are required to be brought in a Federal District Court" can there be any doubt but that this is a civil action of which the District Court has original jurisdiction "founded on a claim or right arising under the Constitution, treaties or laws of the United States"? We think not. The United States is a necessary party defendant to an action to enjoin, annul or set aside an order of the Commission.[11] It

[11] See f. n. 3, supra, and the Lambert opinion, supra.

cannot be sued in the state court. Any suit, therefore, to enjoin, annul or set aside such an order may be brought only by virtue of the Federal statute giving that right. "A suit arises under the law that creates the cause of action.[12] The law that creates the cause of action here is the law that says such a suit must be against the United States and that it must be in the federal district court.

There is nothing to the contrary to what we have drawn from the Lambert case in **Gully v. First National Bank.**[13] The court there pointed out the course to be followed in ascertaining just where to draw the line:

> "This Court has had occasion to point out how futile is the attempt to define a 'cause of action' without reference to the context. United States v. Memphis Cotton Oil Co., 288 U. S. 62, 67, 68. To define broadly and in the abstract 'a case arising under the Constitution or laws of the United States' has hazards of a kindred order. What is needed is something of that commonsense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. One would carry the search for causes backward, almost without end. Bird v. St. Paul F. & M. Insurance Co., 224 N. Y. 47, 51, 120 N. E. 86; Leyland Shipping Co. v. Norwich Fire Insurance Society (1918), A. C. 350, 369; Insurance Co. v. Boon, 95 U. S. 117, 130; Milwaukee & St. Paul Ry. Co. v. Kellogg, 94 U. S. 469, 474. Instead, there has been a selective process which picks the substantial causes out of the web and lays the other ones aside. As in problems of causation, so here in the search for the underlying law. If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal

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[12] American Well Works Co. v. Layne & Bowler Co., 241 U. S. 257, 36 S. Ct. 585, 60 L. Ed. 987.

[13] 299 U. S. 109, 81 L. Ed. 70, 57 S. Ct. 96.

statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by." **Gully v. First Nat. Bank**, 299 U. S. 109, 117, 118.

It is too clear for argument that the dispute here is basically and substantially one that arises under the laws of the United States, because it is one that may be pursued here only by leave of the federal statute and must be brought against the United States itself only in the forum which it prescribes. We, therefore, hold that an action to enjoin conduct directed by an order of the Interstate Commerce Commission is removable as one "arising under the Constitution, treaties or laws of the United States," whether or not the complaint is, in form, a suit to enjoin, annul or suspend such order.

But, appellant here says this order of the Commission is permissive only, and is not mandatory; so, it is said, an action to prevent these defendants from doing acts which are merely "approved and authorized" by the Commission is not an action to enjoin, suspend or annul such order itself. This argument is, we believe, answered by the Supreme Court in the second of the two cases cited above. **Venner v. Michigan Central R. R. Co.**, supra. In that case the argument was made that since, in a removed state court suit to enjoin what the Commission had approved and authorized, the order of the Commission was only permissive, such suit was not prohibited as one to enjoin, annul or set aside the Commission's order. The Court said:

"We agree with the court below that the suit is essentially one to annul or set aside the order of the Commission. While the amended bill does not ex-

pressly pray that the order be annulled or set aside, it does assail the validity of the order and pray that the defendant company be enjoined from doing what the order specifically authorizes, which is equivalent to asking that the order be adjudged invalid and set aside. Lambert Run Coal Co. v. Baltimore & Ohio R. R. Co., 258 U. S. 377, 380, 382. Such a suit must be brought against the United States as the representative of the public and may be brought only in a federal district court. Judicial Code, §§ 208, 211; Act of October 22, 1913, c. 32, 38 Stat. 219; Illinois Central R. R. Co. v. State Public Utilities Commission, 245 U. S. 493, 504-505; North Dakota v. Chicago & Northwestern Ry. Co., 257 U. S. 485, 487; Texas v. Interstate Commerce Commission, 258 U. S. 158, 164; Lambert Run Coal Co. v. Baltimore & Ohio R. R. Co., supra. That the order is not mandatory but permissive makes no difference in this regard. Chicago Junction Case, 264 U. S. 258, 263. And as the state court was without jurisdiction the federal court acquired none by the removal. Lambert Run Coal Co. v. Baltimore & Ohio R. R. Co., supra."

Venner v. Mich. Cent. R. R. Co., 271 U. S. 127, 130.

Appellants seek to find support for their position here in our recent case of **Gulf, Mobile & Ohio R. R. Co. v. Illinois Central Railroad Co.**[14] No similarity exists between the two cases on the point at issue here. In that case the Commission's order had expressly declined to pass upon the legal question that was subsequently presented to the district court. Thus there was not even a permissive order of the commission touching the point there at issue. The same is true as to the case of **Central New England R. R. Co. v. Boston and Albany R. R. Co.**,[15] where it was held that a

[14] (5 Cir.), 225 F. 2d 816.

[15] 279 U. S. 415, 73 L. Ed. 776, 49 S. Ct. 358.

state court had jurisdiction to determine, in a suit between two carriers, the status of contract which was not dealt with by the order of the Commission there relied on by the defendant.

We next come to the question as to whether the trial court properly dismissed the suit after denying the motion for remand. Under the authority of the cases just cited, the court undoubtedly had this duty unless there was a separate cause of action pleaded on which relief could be granted. We think there was none. In fact, little attention is paid to this phase of the case by appellants themselves. They say in their brief:

> "Even if one branch of our suit as brought in the state court should perchance 'founder on the rock' of the Interstate Commerce Commission's order, the other branch would remain—the other branch or phase of the suit having nothing whatsoever to do with any possible effect of the Interstate Commerce Commission's order."

This assertion could only apply to the matters contended for in those prayers of the complaint which, in effect, assert that the plaintiffs are entitled to have an accounting by the officers of their company as to the status of certain negotiable securities and to have such securities maintained in status quo pending a final determination of all differences between the plaintiffs and the defendants, and between the two railroad defendants.[16]

---

[16] These prayers are as follows:

"(g) That until such judicial determination, Central of Georgia Railway Company, its officers, agents and employees, and South Western Railroad Company, its officers, agents and employees be restrained and enjoined from disposing of or changing the status of any assets of South Western Railroad Company;

"(h) That South Western Railroad Company, its officers, agents and employees render an accounting as to whether or not any of the securities described in the complaint or the cash

It will be noted that no affirmative relief in the nature of an accounting between plaintiffs and defendants or between the two railroad defendants is sought. No debt is alleged for which a recovery is prayed. It is clear that the relief prayed in these three paragraphs is purely ancillary to the main object of the suit. As we have said above, the state court had no jurisdiction over such an action and we agree with the trial court that the complaint was subject to dismissal for want of jurisdiction.

The judgment appealed from is affirmed.

A True Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Fifth Circuit.

---

mentioned therein have been expended, and if so for what purpose;

"(i) That if any portion thereof has been delivered to Central of Georgia Railway Company in satisfaction of any alleged indebtedness alleged to be due it by South Western, or otherwise, that Central of Georgia Railway Company be required to restore such to South Western Railroad Company pending a final determination of all differences between South Western and Central of Georgia Railway Company."

FILED
JUN 22 1956
HAROLD B. WILLEY, Cl

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 134

W. H. B. SIMPSON et al.,
Petitioners,

v.

SOUTH WESTERN RAILROAD COMPANY and CENTRAL OF GEORGIA RAILWAY COMPANY,
Respondents.

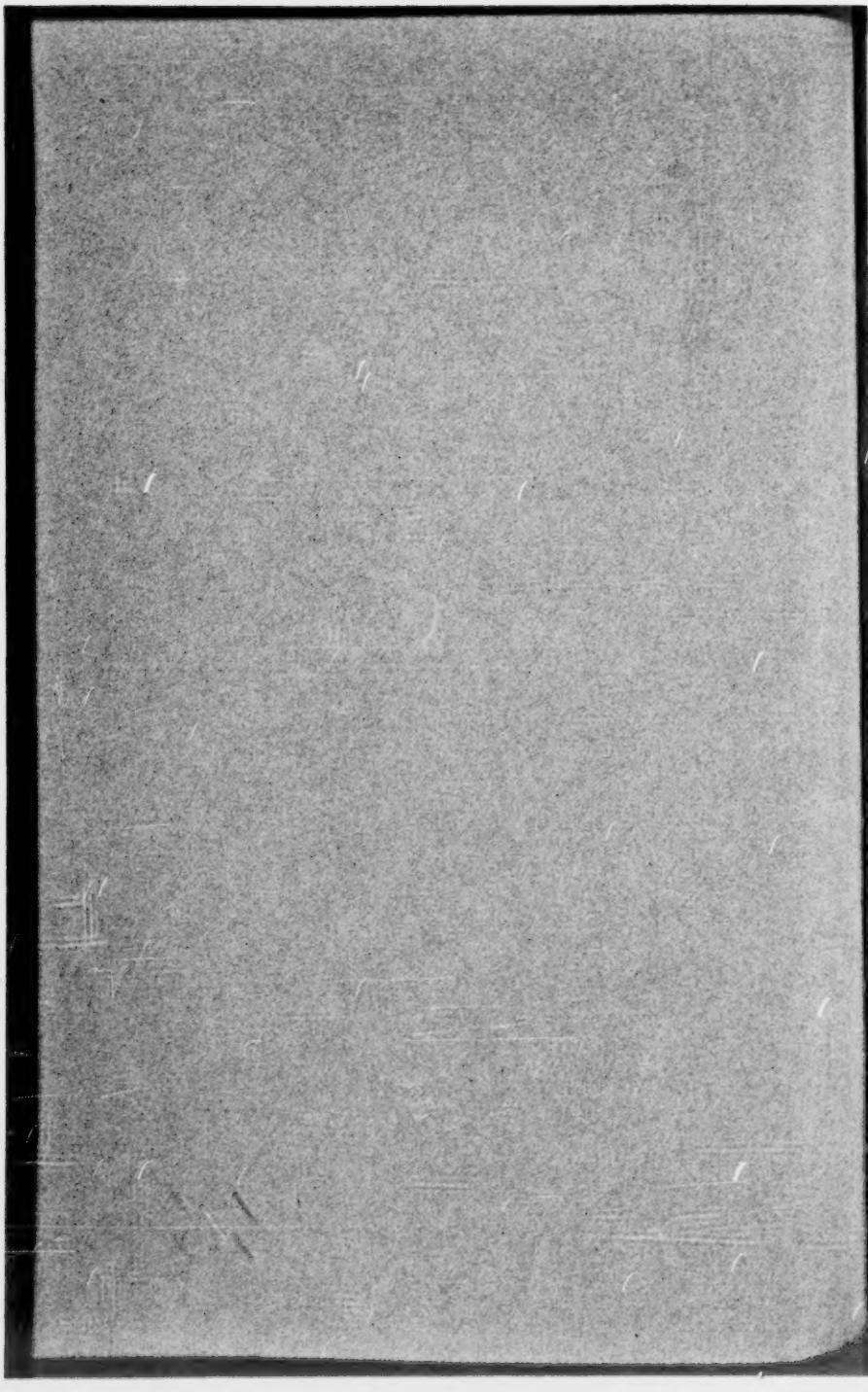
RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

(To the United States Court of Appeals, Fifth Circuit).

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IN THE

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No. .....

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

(To the United States Court of Appeals, Fifth Circuit).

I.

ALLEGED BASIS FOR THE PETITION FOR WRIT OF CERTIORARI.

Petitioners filed suit in the state court. Respondents removed the cause to the federal district court. The District Judge denied the motion to remand and dismissed the petition on motion **without prejudice** on jurisdictional grounds. The Court of Appeals sustained this action. Thus there was no decision on the merits and petitioners' rights have not been prejudiced.

Petitioners seek a writ of certiorari on the sole ground that the Court of Appeals has decided important questions of federal law which have not been but should be settled by this Court (Petition, p. 15).[1]

The Petition for Writ of Certiorari thus poses these questions:

> (a) "Firstly, what important questions of federal law have been decided by the Court of Appeals for the Fifth Circuit in this case?"
>
> (b) "Secondly, have those questions been decided previously by the Supreme Court of the United States?"
>
> (c) "Thirdly, if they have not been decided, are they of such moment as to require the granting of the writ of Certiorari?"

Petitioners' brief has argued extensively the merits of their case. As respondents' brief is aimed solely at the question of certiorari, respondents shall refrain from arguing the merits except as relevant to the matter of certiorari.

II.

WHAT IMPORTANT FEDERAL QUESTIONS HAVE BEEN DECIDED IN THE COURT BELOW?

A.

Petitioners Unduly Magnify and Inaccurately State the Questions Presented for Review.

Petitioners, as appellants in their brief in the Court of Appeals (brief, page 12), stated:

---

[1] "Petition" refers to Petition for Writ of Certiorari.

"We contended and now contend that the legal questions involved are these:

"(1) Is appellants' suit founded on a claim or right arising under the Constitution, treaties or laws of the United States?

"(2) Did appellants in their suit seek to enjoin, set aside, annul or suspend in whole or in part, an order of the Interstate Commerce Commission?"

But now, in their Petition for Writ of Certiorari, petitioners appear to have greatly expanded and in effect enlarged and revised the statement of the questions from two to ten. We do not agree that all of these expanded questions or issues were raised. The issues in this case are not as complex and fundamental as petitioners' statement would indicate! May we analyze their statement of the questions:

1.

Petitioners' question number one:

"(I.) Did the Superior Court of Bibb County, Georgia, a state court having equity jurisdiction, have jurisdiction over an action brought by W. H. B. Simpson et al., as minority stockholders of South Western Railroad Company, a Georgia corporation, against that company, and its majority stockholder. Central of Georgia Railway Company, under a Georgia statute, Code of 1933 (Section 22-711), permitting a minority stockholder to proceed in equity in behalf of himself and other stockholders for fraud or acts ultra vires against a corporation, its officers and those participating therein despite the fact that the Interstate Commerce Commission had authorized the Central of Georgia Railway Company to enter into an operating agreement with South Western Railroad Company?" (Petition, p. 2).

No such issue has been raised or decided in this case. The predicate for that question is erroneous. There was no cause of action pleaded separately and distinct from the effort to enjoin an order of the Interstate Commerce Commission. The question is not supported by the record. The original suit or cause of action in Bibb Superior Court was not simply a minority stockholders' action under Georgia statutes, but was in essence an action to enjoin, annul and set aside an order of the Interstate Commerce Commission. This was decided by both the District Court and the Court of Appeals. Petitioners' question number one as stated incorrectly assumes that the suit in Bibb Superior Court was simply a minority stockholders' action under state law.

2.

Petitioners' question number two:

"(II.) Does the fact that the Interstate Commerce Commission had approved and authorized the Central of Georgia Railway Company to operate the properties of South Western Railroad Company, of which it is the majority stockholder, prevent minority stockholders from proceeding in equity in a state court against South Western Railroad Company and its majority stockholder and from obtaining relief in such court upon the ground that such arrangement is fraudulent and ultra vires as to South Western Railroad Company?" (Petition, p. 3).

This question has neither been raised nor decided, as such. The question does not describe the nature of the "relief" referred to. This question also has an erroneous predicate, just as the first question, and the same comments thereto are applicable here. The only cause of action pleaded was an effort to enjoin an operating agreement authorized by the Interstate Commerce Commission.

3.

Petitioners' question number three:

"(III.) Does such an action arise under the Constitution or laws of the United States when South Western Railroad Company was not authorized or empowered by the Interstate Commerce Commission in and respect?" (Petition, p. 3).

This is a fragmentary part of the basic question as to whether or not the cause of action is in essence an action to annul, set aside or enjoin an order of the Interstate Commerce Commission and therefore one arising under the laws of the United States.

4.

Petitioners' question number four:

"(IV.) Does a grant of authority by the Interstate Commerce Commission to an interstate carrier (which is the majority stockholder of another carrier) to operate, under contract, the properties of such other carrier affect the statutory obligations of such other carrier to its minority stockholders in a case where the Interstate Commerce Commission made no order with respect to the powers or authority of such other carrier?" (Petition, p. 3.)

That question has no foundation in the record. That issue was neither presented nor decided by the District Court of Appeals. It is conceivable that the petitioners could have pleaded their cause of action in such a way as to present that issue, but they did not choose to do so. The minority stockholders' suit in Bibb County Superior Court simply did not raise such a question. There was no decision as to minority stockholders' rights. The decision was merely that the cause was properly removed

and dismissed because petitioners sought to enjoin, annul or set aside an order of the Interstate Commerce Commission. The dismissal was on jurisdictional grounds and without prejudice.

5.

Petitioners' question number five:

"(V.) Does the grant of authority by the Interstate Commerce Commission to an Interstate carrier (which is the majority stockholder of another carrier) to operate such other carrier affect the rights of minority stockholders of such other carrier?" (Petition, p. 3.)

This question was not presented in the courts below. No issue of minority stockholders' rights was raised or decided. Our response to petitioners' question number four is applicable here.

6.

Petitioners' question number six:

"(VI.) Would the grant of authority by the Interstate Commerce Commission to Central of Georgia Railway Company to operate the physical properties of South Western Railroad of which it was majority stockholder, authorize it to take over assets of South Western Railroad Company in the amount of $81,241,549.37, in satisfaction of an alleged indebtedness theretofore disputed by South Western Railroad Company?" (Petition, p. 3.)

The sum stated must be a typographical error! Here again, this issue was neither raised nor decided in the courts below. If such seizure of assets were alleged, the courts below were not required to and did not decide the effects of the Interstate Commerce Commission's order on

the transfer of assets or payments of debts. However, the District Court and Court of Appeals did decide that the petitioners had pleaded a single inseparable cause of action which in effect was an attack on an order of the Interstate Commerce Commission and therefore should be brought only in federal court in accordance with the federal statutes. The Motion to Remand to the state court was denied and the case dismissed without prejudice with the exception that the order provided that any cause of action seeking to annul, enjoin or set aside an order of the Interstate Commerce Commission must be brought in federal court in accordance with the federal statutes.

7.

Petitioners' question number seven:

"(VII.) Would a suit in a state court by minority stockholders praying that until an accounting and judicial determination of all differences between South Western and Central were had, Central and South Western be enjoined from disposing of or changing the status of any assets of South Western Railroad be a suit arising under the Constitution or laws of the United States and thus removable to the federal court?" (Petition, p. 4.)

Here again, there is no basis in the record for such a question. There is no such suit in the record. An analysis of the suit in the trial court will indicate that the minority stockholders' prayers for the injunction of the disposition or change in the status of the assets of South Western and an "accounting" were purely ancillary to the main attack on an order of the Interstate Commerce Commission. There was a single inseparable cause of action constituting an effort to annul, enjoin or set aside a Commission order. Thus the courts below were neither confronted with nor decided such a question.

8.

Petitioners' question number eight:

"(VIII.) Would such a suit praying that South Western Railroad Company render an accounting as to whether or not any of the securities or cash it had on hand at the time of taking of control by Central of Georgia had been expended and if so for what purpose, be one arising under the Constitution and laws of the United States? Would it be one to suspend, enjoin, annul or set aside in whole or in part an order of the Interstate Commerce Commission?" (Petition, p. 4.)

The response to question number seven above is applicable here. The record will not support the statement of such an issue. The minority stockholders' cause of action was one to suspend, enjoin, annul or set aside in whole or in part an order of the Interstate Commerce Commission. They cannot split off a fragmentary portion of their cause of action and predicate a hypothetical question thereon. Petitioners' question number eight was not presented to the District Court or Court of Appeals.

9.

Petitioners' question number nine:

"(IX.) Was a cause of action asserted in the complaint other than that with respect to the validity of the operating agreement?" (Petition, p. 4.)

If this question can be construed as asking whether or not there was a separate and independent cause of action distinct and separate from the attack on the order of the Interstate Commerce Commission, it is accurate. Petitioners did take the position that even if part of their suit

was properly removed and later dismissed because it was in effect an attack on an order of the Interstate Commerce Commission, then there was still enough left in their suit as a separate cause of action to be remanded to the state court. That was an issue that was decided against them.

10.

Petitioners' question number ten:

"(X.) Was the state court action one to enjoin conduct directed by an order of the Interstate Commerce Commission?" (Petition, p. 4.)

This question has no basis in the record if petitioners give any particular stress to the word "directed". Although not material, the order of the Interstate Commerce Commission was an authorization and an approval of an operating agreement and was not mandatory. At best, this question is still a fragmentary part of the basic question as to whether the cause of action was one to annul, enjoin or set aside an order of the Interstate Commerce Commission.

B.

Then What Are the Questions For Review?

Respondents respectfully submit that the following is a fair and accurate statement of the questions:

(1) Does the petition basically set forth an action to enjoin, set aside, annul or suspend an order of the Interstate Commerce Commission, which action must be brought only in the federal courts? [28 USC, Secs. 1336, 2321 and 2325, and 49 USC, Sec. 17 (9)].

(2) Does such an action arise under the Constitution or laws of the United States so as to be removable? (28 USC, Sec. 1441).[2]

(3) Is there pleaded a cause of action separate and distinct from the attack on the order of the Interstate Commerce Commission? If so, should the District Court have remanded such separate cause of action? (Title 28, USC, Section 1441).

III.

THE STATEMENT OF THE CASE.

Respondents cannot accept petitioners' statement of the case in its entirety. It is full of conclusions and argument. It would lead one to believe that the petition primarily sought an accounting and preservation of assets of South

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[2] As petitioners did not quote the removal statute, we do so here:

28 U. S. C. 1441 (a) through (c). "Actions removable generally.

"(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State Court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants to the district court of the United States for the district and division embracing the place where such action is pendin

"(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

"(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction. June 25, 1948, c. 646, 62 Stat. 937."

Western. They brush off the main feature of the case at page 14 of their brief, stating:

> "The suit also prayed for a decree adjudging the so-called operating agreement to be null and void; that it be cancelled and that operations under it constitute a course illegally and oppressively pursued in the name of South Western by Central, its majority stockholder, which course is in violation of the rights of the petitioners and other stockholders similarly situated."

The prayers of the petition clearly show that the principal purpose of the complaint is an effort to have declared null and void and to enjoin **an operating agreement which had been executed and put into effect.** The petition shows that this operating agreement had been authorized and approved by the Interstate Commerce Commission.

Petitioners sought twofold injunctive relief, pending adjudication of the "differences" **in some other action and, perhaps, in some other forum in the indefinite future:** One, to have the operating agreement declared null and void and to restrain the operation of the South Western by the Central under that agreement [Prayers (b), (c), (d), (e) and (f), Paragraph 80, Transcript, p. 41]; two, an ancillary additional prayer for relief is to have the South Western officers restore any assets of South Western which may have been transferred to the Central since January 1, 1954, and to restrain the transfer or disposition of any other assets of South Western [Prayers (g), (h) and (i) of Paragraph 80, Transcript, p. 42].

The case is clearly one inseparable cause of action basically designed to enjoin, annul and set aside an order of the Interstate Commerce Commission.

IV.

ARGUMENT AS TO THE NATURE OF THE CASE AND THE QUESTIONS RAISED.

The best way to resolve the dispute as to what was the nature of the case, what were the questions in the courts below, and what issues are presented in this Petition for Writ of Certiorari is to quote salient parts of the decisions in the courts below.

Judge Bootle, District Judge, in his opinion stated (Transcript, p. 102):

> "Our first inquiry is: Do we have here an action which 'arises under the Constitution, laws or treaties of the United States?' 28 U. S. C., Section 1331."

He discussed certain cases and then said (Transcript, p. 106):

> "In the light of these authorities and the numerous cases cited therein, it is the opinion of this court that were it not for the provisions of Title 28, Section 1336 and Section 2321 et sequentia, and Title 49, Section 17 (9) of the United States Code, the petition would not state a cause of action which arises under the Constitution or laws of the United States, but how stands petitioners' case in view of said provisions and particularly in view of the second inquiry: Is this an 'action to enforce, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission?' "

Judge Bootle went on to state (transcript, p. 108):

> "The allegations of the petition, construed as they must be with the exhibits attached thereto, convince this court that petitioners' action is essentially one to

enjoin, set aside, annul and suspend the said order of the Interstate Commerce Commission. Such is the effect of the controlling decisions."

As authority for Judge Bootle's opinion he cited **Lambert Run Coal Company v. Baltimore and Ohio Railroad Company**, 258 U. S. 377, 66 L. Ed. 671, 42 S. Ct. 349 (1922), (transcript, p. 110) and **Venner v. Michigan Central Railroad Company**, 271 U. S. 127, 70 L. Ed. 868, 46 S. Ct. 444 (1926), (transcript, p. 111). The above quotations reflect the only issues passed upon in the denial of the Motion to Remand. The respondents Motion to Dismiss for want of jurisdiction begins at page 117 of the transcript. The grounds for that motion were that the State Court did not have jurisdiction because all actions to enjoin, set side, annul or suspend an order of the Interstate Commerce Commission must be brought against the United States of America and in the Federal Courts; and that the District Court did not have jurisdiction because the State Court had none and also because such a suit must be brought before a three judge court; and the petition did not show that the Middle District of Georgia is a judicial district wherein lies the residence or principal office of any of the parties that bring the suit. The District Judge (transcript, p. 121), dismissed the complaint, without prejudice, with the following exceptions:

"The court finds and so decrees that the Central of Georgia Railway Company, one of the named defendants, is operating all of the property of South Western Railroad Company, the other named defendant; that such operation is under a contract made and entered into by and between the said companies. That said contract has been approved by the Interstate Commerce Commission by order duly entered on the 14th day of May, 1954.

"That exclusive jurisdiction of any action to enforce, enjoin, set aside, annul or suspend, in whole or

in part, the said order of May 14th, 1954, is vested in the Federal Courts and is denied to the State Courts. That the United States of America is a necessary party to any such action."

Thus it is clear that in the District Court the basic question was: Does the petition in effect seek to enjoin, annul or set aside in w ole or in part an order of the Interstate Commerce Commission? The subsidiary questions were whether such an action is removable and whether there was pleaded a separate cause of action which should have been remanded.

Judge Tuttle's opinion for the Court of Appeals in this case also clearly describes the facts and issues.

Judge Tuttle describes the minority stockholders' case as follows (beginning at p. 32 of Petition):

"In essence the appellants charge that the Central of Georgia Railway Company had acquired some 98% of the stock in South Western; that the interests of the majority were thus to favor Central; that Central selected the directors, eliminating any who were not Central employees; that there existed a dispute between South Western and Central as to the state of accounts between them resulting from operations subsequent to 1948; that Central's representatives on South Western's board were not interested or alert in asserting the point of view of South Western; that the new board, with majority stockholder's approval, had negotiated an agreement with Central to operate the railroad properties of South Western on terms unfair to South Western stockholders other than Central, such operating agreement being subject to the approval of the Interstate Commerce Commission; that such agreement amounted to a lease of the South Western road and transfer of its franchise, which was

ultra vires and void under the Georgia laws; that South Western had some $1,200,000 worth of bonds and other liquid assets which had been turned over to the new officers upon their taking control.

"Having thus charged, appellants prayed the court to decree the operating agreement to be 'ultra vires, null and void'; that it would cause serious injury to South Western and it was oppressive; that it be cancelled and operations under it be restrained and enjoined; that an accounting be rendered by defendants as to the disposition of the securities with a return of any of them that might have been transferred to Central in satisfaction of any alleged indebtednes or for any other purpose, pending a final determination of 'all differences between South Western and Central.'

"Several basic facts emerge from even this short recitation of allegations and prayer for relief. The first is that the complaint definitely asked the Superior Court of Bibb County, Georgia, to enjoin the operation of an agreement which had been authorized by the Interstate Commerce Commission. The court may take judicial notice of such order. The second is the fact that the complaint did not purport on its face to touch on any order of the Commission, although one had in fact been entered prior to the filing of the suit. The third is that no cause of action is asserted in the complaint other than that attacking the validity of the operating agreement and the right of the plaintiffs to bring the action under the Georgia statute, there being no separate cause of action for an accounting between the two corporations or an action for damages for improper management for prior years or a showing of irreparable injury or insolvency of defendants to support an action to enjoin the transfer of securities alone.

"Thus there is here nothing more or less than a state court suit seeking to prevent the defendants

from carrying out an operating agreement between two railroad companies, both admittedly subject to all proper action of the Interstate Commerce Commission, which at the time of the filing of the suit had entered an order specifically authorizing it."

Then Judge Tuttle went on to analyze appellant's argument as being the narrow position that the suit is not one to "suspend, enjoin, annul or set aside" an order of the Interstate Commerce Commission (Petition, p. 33). Then Judge Tuttle said (Petition, p. 34):

> "We find that both of these propositions have been decided against the contention of the appellants by the Supreme Court, the first in Lambert Run Coal Co. v. Baltimore & Ohio R. R. Co., and the second in Chas. H. Venner v. Michigan Central R. R. Company."

Judge Tuttle then stated (Petition, p. 40):

> "We next come to the question as to whether the trial court properly dismissed the suit after denying the motion for remand. Under the authority of the cases just cited, the court undoubtedly had this duty unless there was a separate cause of action pleaded on which relief could be granted. We think there was none. In fact, little attention is paid to this phase of the case by appellants themselves. They say in their brief:
>
> > " 'Even if one branch of our suit as brought in the state court should perchance "founder on the rock" of the Interstate Commerce Commission's order, the other branch would remain—the other branch or phase of the suit having nothing whatsoever to do with any possible effect of the Interstate Commerce Commission's order.'
>
> "This assertion could only apply to the matters contended for in those prayers of the complaint which,

in effect, assert that the plaintiffs are entitled to have an accounting by the officers of their company as to the status of certain negotiable securities and to have such securities maintained in status quo pending a final determination of all differences between the plaintiffs and the defendants, and between the two railroad defendants.

"It will be noted that no affirmative relief in the nature of an accounting between plaintiffs and defendants or between the two railroad defendants is sought. No debt is alleged for which a recovery is prayed. It is clear that the relief prayed in these three paragraphs is purely ancillary to the main object of the suit. As we have said above, the state court had no jurisdiction over such an action and we agree with the trial court that the complaint was subject to dismissal for want of jurisdiction."

Thus it is clear that the only issues raised in this case are these:

(1) Does the petition basically set forth an action to enjoin, set aside, annul or suspend an order of the Interstate Commerce Commission, which action must be brought only in the federal court?

(2) Does such an action arise under the Constitution or laws of the United States so as to be removable?

(3) Is there pleaded a cause of action separate and distinct from the attack on the order of the Interstate Commerce Commission of such nature as should have been remanded?

V.

PETITIONERS' ARGUMENT.

Petitioners state (Petition, p 15): "1. (g): Petitioners contend that there was no basis for federal jurisdiction, and that the case was erroneously removed from the Superior Court of Bibb County to the District Court of the United States for the Middle District of Georgia."

Petitioners contend (Petition, p. 15) that the United States Court of Appeals has decided important questions of federal law which have not been, but should be, settled by the Supreme Court of the United States. "The Interstate Commerce Commission upon the application of Central of Georgia Railway Company authorized it to operate the properties of South Western Railroad Company of which it was majority stockholder. Does such an order affect the rights of minority stockholders of South Western so as to prevent their asserting their rights as such minority stockholders under state law and a suit in the proper state Court? Does such an order in any way affect the obligations of Central of Georgia as a majority stockholder in South Western to minority stockholders?"

We submit that here again petitioners inaccurately state the issue before this court. The question is not what affect an Interstate Commerce Commission order has on the rights of minority stockholders. The real question is whether or not the minority stockholders in their suit actually sought to enjoin, annul or set aside an order of the Interstate Commerce Commission. The dismissal of the minority stockholders' case was without prejudice, so there is no question of whether or not their rights have been adversely affected. The question is whether or not they could bring the action that they did bring in a state court or must it have been brought in a federal court in accordance with the appropriate federal law. Petitioners

endeavor to inject in their petition basic problems of constitutional rights and constitutional law. There are no such issues. It is purely a procedural and jurisdictional issue. There is no question of substantive rights.

Petitioners argue (Petition, p. 16) that the South Western Railroad Company had no charter powers to enter into such an operating agreement. If petitioners desire, they can have this matter adjudicated by an appropriate state court action or by an appropriate federal court action. The only thing that has been decided in this litigation is that the type of suit that they brought must be brought in a federal court and in accordance with appropriate federal statute, because it in effect was primarily an action to annul, enjoin or set aside an order of the Interstate Commerce Commission.

Petitioners further argue (Petition, p. 17) about the question of an accounting as to certain assets of the South Western. Here again, if they have a cause of action, it can be asserted in an appropriate state court proceeding or perhaps as ancillary relief in an appropriate federal court proceeding. None of their substantive rights have been adjudicated in this matter.

Petitioners (Petition, p. 18) argue that "Petitioners are not attempting to set aside, annul or suspend the order of the Commission, but are attempting to prevent operation under the order." Both the District Court and the Court of appeals have ruled against them on that contention and have held that their suit was in essence one to set aside, annul or suspend an order of the Interstate Commerce Commission. Petitioners even admit that they sought to cancel the agreement (Petition, p. 16). The Venner case held that a petition to enjoin acts authorized by a Commission order is the equivalent of a petition to enjoin the order. That is the major issue which this court would be called upon to decide if the petition for Writ of Certiorari

were granted. However, the federal law thereon is well settled. This presents no important federal question which this court has not but should decide. All that need be done is to apply well established law to the facts of our case. This the lower courts have done.

Petitioners state (Petition, p. 20): "Therefore there was an independent cause of action set out in which minority stockholders were plaintiffs and the corporation and its majority stockholder were defendants." That issue has been decided adversely by the District Court and the Court of Appeals and is the ancillary question which this court would decide if Petition for Writ of Certiorari were granted. However, this does not raise an important federal question which this court has not but should decide. The law on this point is also well settled.

If petitioners desire an adjudication of their claim, they can follow proper procedure. The decisions of the District Court and the Court of Appeals are without prejudice to petitioners bringing their case in a proper forum and a proper manner, if they have a cause of action.

VI.

THESE FEDERAL QUESTIONS AREN'T NEW. THEY HAVE BEEN SETTLED BY THIS COURT.

There are United States Supreme Court decisions in point. The Lambert Run Coal case[3] is clear and convincing

[3] In the case of *Lambert Run Coal Co. v. Baltimore and Ohio Railroad Co.*, 258 U. S. 377, 66 L. Ed. 671, 42 S. Ct. 349 (1922), the Lambert Run Coal Company brought suit in a State Court to enjoin the railroad company from following certain of its rules in connection with freight car distribution during an acute freight car shortage alleging that such practices violated the Interstate Commerce Act. The defendant railway removed the case to the Federal Courts. The railway defendant filed a consolidated Motion to Dismiss and Answer, showing, among other things, that the rules that

authority that a petition which attempts to enjoin acts which have been authorized by an order of the Interstate

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it was following had been prescribed by the Interstate Commerce Commission. In ordering a dismissal of the case Justice Brandeis declared

> The bill should have been dismissed for want of jurisdiction and without prejudice. "The rule of the railroad here complained of was that prescribed by the Commission. To that rule the railroad was bound to conform unless relieved by the Commission, or enjoined from complying with it by decree of a court having jurisdiction. By this suit such a decree was in effect sought . . .
>
> "The fact that this was a suit to set aside an order of the Commission did not appear on the face of the bill; but it became apparent as soon as the Motion to Dismiss was filed. Jurisdiction cannot be effectively acquired by concealing for a time the facts which conclusively establish that it does not exist. As the State Court was without jurisdiction over either the subject matter or the United States, the District Court could not acquire jurisdiction over them by the removal. The jurisdiction of the Federal court on removal is, in a limited sense, a derivative jurisdiction. If the State court lacks jurisdiction of the subject matter or of the parties, the Federal court acquires none, although it might in a like suit, originally brought there, have had jurisdiction. Courtney v. Pradt, 196 U. S. 89, 92, 49 L. Ed. 398, 399, 25 Sup. Ct. Rep. 208; American Well Works Co. v. Layne & B. Co., 241 U. S. 257, 258, 60 L. Ed. 987, 988, 36 Sup. Ct. Rep. 585; to the situation here presented, cases like Healy v. Sea Gull Specialty Co., 237 U. S. 479, 59 L. Ed. 1056, 35 Sup. Ct. Rep. 658, relied upon by appellant, have no application. For, while it is true that a plaintiff by his first pleading determines what right he will sue on, and that the defenses set up either anticipatorially by him or in due course by the defendant, cannot affect the jurisdiction when it depends on that right, yet the plaintiff may not, by alleging a frivolous claim or a fictitious situation, confer upon a court jurisdiction which, as determined by the plaintiff's real cause of action, it has not. The Fair v. Kohler Die & Specialty Co., 228 U. S. 22, 25, 57 L. Ed. 716, 717, 33 Sup. Ct. Rep. 410. And the vital interest of the United States was one which the plaintiff could neither ignore nor prejudice by indirection. Compare International Postal Supply Co. v. Bruce, 194 U. S. 601, 48 L. Ed. 1134, 24 Sup. Ct. Rep. 820; Naganab v. Hitchcock, 202 U. S. 473, 50 L. Ed. 1113, 26 Sup. Ct. Rep. 667; United States ex rel. Goldberg v. Daniels, 231 U. S. 218, 58 L. Ed. 191, 34 Sup. Ct. Rep. 84; Louisiana v. McAdoo, 234 U. S. 627, 58 L. Ed. 1506, 34 Sup. Ct. Rep. 938. The district court should therefore have dismissed the bill as soon as it became apparent that the suit was one to set aside an order of the Commission."

Commerce Commission is in effect a petition seeking to annul, suspend and enjoin an order of the Interstate Commerce Commission and therefore can be brought only in federal court in accordance with federal statutes.

The Venner case[4] is a very similar case to the Lambert Run Coal case and decided the same issues involved in our case.

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[4] *Clarence H. Venner v. Michigan Central Railroad Company*, 271 U. S. 127, 70 L. Ed. 868, 46 S. Ct. 444 (1926). This case followed closely the Lambert Run Coal case and is also strikingly similar to our case. In the Venner case a minority stockholder brought suit in the State court to enjoin the defendant railroad company from carrying out an agreement with two other railroad companies to collectively purchase and finance a large number of locomotives. The case was removed on grounds of diversity. The purchase plan had been approved by an order of the Interstate Commerce Commission. *The minority stockholder alleged that the plan was in violation of the laws of the State wherein defendant railway was incorporated* and of other states wherein defendant operates. The amended complaint showed that the defendant railway company was relying on an order of the Interstate Commerce Commission and alleged that Section 20a of the Interstate Commerce Act and the Commission's order transcended Federal powers and encroached on the State's power. Justice Van Devanter said:

> "We agree with the Court below that the suit is essentially one to annul or set aside the order of the Commission. While the amended bill does not expressly pray that the order be annulled or set aside, it does assail the validity of the order and prays that the defendant company be enjoined from doing what the order specifically authorizes, which is equivalent to asking that the order be adjudged invalid and set aside . . . that the order is not mandatory, but permissive, makes no difference in this regard."

The foregoing case thus clearly establishes that the Courts will pierce the form and consider the substance. The pleader may avoid referring to the Federal law or the Commission order. The pleader may plead State law and claim that his cause is based upon State law. But nevertheless, the Courts will discover from the substance that the action seeks to strike down a Commission order.

VII.

THIS CASE IS NOT OF SUCH NATURE OR CONSEQUENCE AS WOULD JUSTIFY THE GRANTING OF THE WRIT OF CERTIORARI.

As discussed above, the federal questions are old ones, previously decided by this court, and do not require further pronouncement in this case. Petitioners merely reargue their case in their petition. The rules of this court provide that a review by Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only when there are special and important reasons therefor (Rule 19).

As was so aptly stated by Chief Justice Taft: The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeal was given for two purposes: first, to secure uniformity of decisions between those courts in the nine circuits; and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing.[5]

Certiorari should not be granted except in cases involving principles, the settlement of which is of importance to the public, as distinguished from that of parties and in cases where there is a real and embarrassing conflict of opinion and authority between Courts of Appeal.[6]

This case merely involves commonplace questions of removability and jurisdiction, involving an action to annul,

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[5] Magnum Import Co. v. Coty, 262 U. S. 159, 67 L. Ed. 531, 43 S. Ct. 587.

[6] Rice v. Sioux City Memorial Park Cemetery, 349 U. S. 70, 99 L. Ed. 897, 75 S. Ct. 614.

enjoin or set aside an order of the Interstate Commerce Commission. The action was dismissed without prejudice to a proper action either in the State or Federal Courts.

Therefore, it is respectfully urged that there is no basis for the granting of a Writ of Certiorari in this case, and therefore the petition for Writ of Certiorari should be denied.

Respectfully submitted,

.....
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Certificate of Service.

I hereby certify that I have this day served a copy of the within and foregoing Brief in Opposition to the Petition for Writ of Certiorari upon petitioners by depositing a

copy thereof in a United Sates mail box, with first class postage prepaid, addressed to their counsel of record, at the following post office adress:

Charles J. Bloch, Esq.,
Bloch, Hall, Goover and Hawkins,
First National Bank Building,
Macon, Georgia.

This.....day of June, 1956.

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